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v.
Action Automotive, Inc.

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February 24, 1984

Court: United States Court of Appeals
for the Sixth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Katz, Stewart J.

Entry	Date	Note	Proceedings and Orders
1	Dec 14 1983		Application for extension of time to file petition and order granting same until January 28, 1984 (C'Connor, December 15, 1983).
2	Jan 17 1984		Application for further extension of time to file petition and order granting same until February 27, 1984 (C'Connor, January 19, 1984).
3	Feb 24 1984	G	Petition for writ of certiorari filed.
5	Mar 22 1984		Order extending time to file response to petition until April 24, 1984.
6	Apr 23 1984		Brief of respondent Action Automotive, Inc. in opposition filed.
7	Apr 25 1984		DISTRIBUTED. May 10, 1984
9	May 14 1984		Petition GRANTED.
10	Jun 26 1984		Order extending time to file brief of petitioner on the merits until July 19, 1984.
11	Jul 6 1984		Joint appendix filed.
12	Jul 18 1984		Brief of petitioner NLRB filed.
13	Aug 15 1984		Brief of respondent Action Automotive, Inc. filed.
14	Aug 21 1984		CIRCULATED.
15	Aug 28 1984		SET FOR ARGUMENT. Monday, October 29, 1984. (2nd case)
16	Oct 5 1984	X	Reply brief of petitioner NLRB filed.
17	Oct 29 1984		ARGUED.

PETITION FOR WRIT OF CERTIORARI

No. 83-1416

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In the Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ACTION AUTOMOTIVE, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether, under Section 9(b) of the National Labor Relations Act, 29 U.S.C. 159(b), the Board is prohibited from excluding from a collective bargaining unit employees who are close relatives of the owners of the closely held corporation that employs them, unless the employee-relatives receive special job-related privileges.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ACTION AUTOMOTIVE, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-5a) is reported at 717 F.2d 1033. The decision and order of the National Labor Relations Board (App., *infra*, 7a-20a) are reported at 262 N.L.R.B. 423. The decision, direction, and certification of representative of the NLRB (App., *infra*, 21a-23a) and the hearing officer's report and recommendations (App., *infra*, 24a-47a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1983 (App., *infra*, 6a). On December 15, 1983, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including January 28, 1984. On January 19, 1984, Justice O'Connor further

extended the time for filing a petition for a writ of certiorari to and including February 27, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2(3) of the National Labor Relations Act, 29 U.S.C. 152(3), provides in pertinent part:

> The term "employee" • • • shall not include • • • any individual employed by his parent or spouse • • •.

Section 9(b) of the National Labor Relations Act, 29 U.S.C. 159(b), provides in pertinent part:

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this [Act], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof • • •.

STATEMENT

1. Respondent is an automobile parts and gasoline dealer with outlets in a number of cities in Michigan (App., *infra*, 2a). The dealership—a closely held corporation—is owned equally by three brothers, Richard, Robert and James Sabo, who are president, vice president and secretary, respectively. The three Sabo brothers are actively involved in respondent's daily operation and together they make all of its policy decisions (*ibid.*).

On March 31, 1981, the Retail Store Employees Union, Local 40 (the Union), filed a petition with the Board requesting that a representation election be held among respondent's employees (App., *infra*, 24a). Respondent and the Union stipulated to elections in two bargaining units—a unit of store and warehouse employees at respondent's nine retail stores (Unit A) and a unit of office clerical employees at the headquarters office (Unit B) (*id.* at 24a-25a). The election was held on May 29, 1981, and the Union received a plurality of the votes in each unit, but a sufficient number of ballots was challenged to place the outcome of the election in doubt (*id.* at 25a).[1]

2. The only challenged ballots of significance here were those of Diane and Mildred Sabo. Following a hearing, the Board's hearing officer recommended excluding both of them from their respective units and sustaining the challenges to their ballots because of their close family relationship with the three brothers who owned and operated respondent (App., *infra*, 29a-33a; 33a-37a).

The hearing officer found that Diane Sabo is a regular, part-time general ledger clerk at respondent's headquarters office in Flint, Michigan (App., *infra*, 30a). Diane is also the wife of respondent's President, Richard Sabo. She resides with her husband and both work at the same office (*ibid.*). At work, Diane Sabo often goes to lunch with Richard and one or both of his brothers. She regularly takes her breaks in Richard's office. She is the only clerical employee who works part-time and she is the only one who receives a salary rather than hourly pay. In addition, she is allowed to take her breaks when she pleases, instead of according to the schedule established by the office manager (App., *infra*, 30a-31a).

On the basis of these findings, the hearing officer declined to find that Diane Sabo enjoys any "special privi-

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[1] The vote in Unit A was 20-18 with one challenged ballot—Mildred Sabo's. The vote in Unit B was 4-3 with five challenged ballots, including that of Diane Sabo. The challenged ballots were determinative in both units because respondent alleged and the hearing officer found that one of the challenged ballots cast in Unit B (Fred Britton's) should have been counted in Unit A (App., *infra*, 27a, 44a-45a).

leges," but nevertheless held that she "has a community of interest separate from that of the other clerical employees in unit B" and therefore recommended that the challenge to her ballot be sustained (App., *infra*, 33a).

Mildred Sabo was found by the hearing officer to be a full-time cashier at one of respondent's retail stores in Barton, Michigan. She is the mother of the three Sabo brothers who own and operate the Company. She lives with Secretary-Treasurer James Sabo and sees her other sons and their families regularly. She makes almost daily telephone calls to the main office in order to talk to her sons (App., *infra*, 33a, 35a). At work, Mildred Sabo is not required to punch a time clock; she records her time on a card. She earns 25 cents per hour more than any other cashier, but she is also one of respondent's most experienced cashiers (*id.* at 34a).

Based on these findings, the hearing officer found that Mildred Sabo does not receive any "special privileges" on the job (App., *infra*, 36a). Nevertheless, he concluded that, "in view of her relationship" with her three sons who own and operate respondent, "Mildred Sabo's interests are more closely aligned with management than with [respondent's] employees" (*ibid.*).

The Board adopted the hearing officer's findings and recommendations, but noted that Diane Sabo should be excluded from the unit not only because of her relationship to respondent's owners, but also because she enjoyed special job-related privileges, viz., "her irregular work schedule, her breaks and lunches with corporate officers in corporate offices, her being paid a salary rather than hourly pay, and not being required to punch a time clock" (App., *infra*, 21a-22a n.2). The Board certified the Union as the exclusive representative in Unit A,[3] and directed the Regional Director to count two of the other challenged ballots in Unit B, which resulted in a tally of 5-4 for the Union and the Union's certification in that unit as well (App., *infra*, 15a, 22a).

Respondent then refused to bargain with the Union, contending that the certifications were not valid. The Union filed charges with the Board, and the Board, declining to reconsider its earlier certification determination, found that respondent had violated Section 8(a)(1) and (5) of the Act, 29 U.S.C. 158(a)(1) and (5), and ordered it to bargain with the Union (App., *infra*, 7a-18a).

3. The court of appeals denied enforcement of the Board's order (App., *infra*, 1a-5a). Relying on its decisions in *NLRB* v. *Hubbard Co.*, 702 F.2d 634 (6th Cir. 1983), and *NLRB* v. *Sexton*, 203 F.2d 940 (6th Cir. 1953), the court held that the Board had no authority under Section 9(b) of the Act, 29 U.S.C. 159(b), to exclude individuals from bargaining units solely because of their close family relationship with those who own and operate the business (App., *infra*, 3a). Instead, the court concluded that "familial ties can only be considered as evidence of a special status when the employee receive[s] job-related benefits or other favorable working conditions which flow from the relationship" (*ibid.*).

Applying this standard to the two employees at issue, the court of appeals found that "[t]he only factor of Mildred's special status is her family ties to the Company * * * [and] such family ties alone are insufficient to establish 'special status'" (App., *infra*, 5a). With regard to Diane Sabo, the court acknowledged that her

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[3] The Board found it unnecessary to decide whether the ballot of Fred Britton who voted in Unit B should be transferred to Unit A, noting that because of the exclusion of Mildred Sabo, Britton's ballot was not determinative in that unit (App., *infra*, 22a n.2).

"work schedule differed significantly from that of her fellow employees," but concluded that such a "single instance of a special treatment is insufficient evidence of a 'special status'" to support the Board's order (*id* at 4a-5a).

REASONS FOR GRANTING THE PETITION

The holding of the court of appeals, that the Board lacks authority under Section 9(b) of the Act, 29 U.S.C. 159(b), to exclude from a bargaining unit close relatives of someone who owns and operates a business, unless the Board can make a substantial showing that the employee enjoys special job-related benefits, conflicts squarely with the decisions of three other courts of appeals on a recurring issue in the administration of the Act. In addition, the court of appeals' attempt to delimit the factors the Board may consider in determining what is an appropriate collective bargaining unit is contrary to repeated holdings of this Court that Congress invested the Board and not the courts with the authority to define appropriate units for bargaining. Finally, the decision below is inconsistent with important policies embodied in the Act; it not only directly alters the outcome of representation elections in disregard of the employees' Section 7 (29 U.S.C. 157) right to choose their agents, but it more generally "tends to obliterate the line between management and labor." *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 494 (1947) (Douglas, J., dissenting).

1. The Board has long held the view that "employees of a company who are in an intimate [,family] relationship with officers of the company" should be "excluded from an appropriate [bargaining] unit." *Jerry and Edythe Belanger*, 32 N.L.R.B. 1276, 1279 n.4 (1941). See also *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 194 (1981) (Powell, J., dissenting); *Burke Brewery, Inc.*, 54 N.L.R.B. 1061, 1062 n.2 (1944); *Standard Magazines, Inc.*, 31 N.L.R.B. 285, 289 (1941); *Louis Weinberg Associates, Inc.*, 13 N.L.R.B. 66, 69 (1939). In its early decisions, the Board did not cite the statutory basis for its determination to exclude such employee-relatives, but eventually it took the position that it was empowered to exclude them under Section 2(3) of the Act, 29 U.S.C. 152(3), which provides that individuals who are employed by their parents or spouse are not "employees" under the Act. See *Foam Rubber City #2*, 167 N.L.R.B. 623 (1967).

In *NLRB* v. *Caravelle Wood Products, Inc. (Caravelle I)*, 466 F.2d 675, 678-679 (7th Cir. 1972), the court of appeals rejected the Board's reliance on Section 2(3) to support its order excluding employee-relatives who had received no special job-related privileges.[3] The court, however, remanded the case to the Board so that it could consider, based on a "case-by-case analysis," whether exclusion was warranted under Section 9(b) of the Act. The court identified the following factors that the Board should consider in deciding whether to exclude an employee from a unit because of family relationship (466 F.2d at 679):

> [H]ow high a percentage of stock the parent or spouse owns, how many of the shareholders are related to one another, whether the shareholder is actively engaged in management or holds a supervisory position, how many relatives are employed as compared with the total number of employees, [and] whether the relative lives in the same household or is partially dependent on the shareholder.

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[3] The Seventh Circuit agreed with the view of the Sixth Circuit in *NLRB* v. *Sexton*, 208 F.2d 940 (1953), that Section 2(3) covers only cases where the parent or spouse of an employee is the sole owner of the business—not cases where he is a substantial stockholder of a closely held corporation. 466 F.2d at 678-679.

On remand, the Board applied the criteria articulated by the court and reaffirmed its exclusion of the spouses and children of key stockholders and officers of the corporation. 200 N.L.R.B. 855, 856 (1972). In enforcing the Board's supplemental decision, the Seventh Circuit emphasized that "none of the guidelines suggested by the court [in *Caruvelle I*] is job-related." *NLRB* v. *Caruvelle Wood Products, Inc. (Caruvelle II)*, 504 F.2d 1181, 1186-1187 (1974). Rather, the Board had the authority "to exclude employees on the basis *of* family relationship—without regard to job-related factors—provided the factual finding implicitly required by the [*Caruvelle I*] guidelines is made in each case." *Id.* at 1187.[8]

[8] The Board expressly adopted the *Caruvelle* criteria in *Parisoff Drive-In Market, Inc.*, 201 N.L.R.B. 813, 814 n.2 (1973), and since that time has utilized them in determining whether employees should be excluded from collective bargaining units because of their family relationship with those who own and operate a business organization. *See, e.g., Modern Mfg. Co.*, 261 N.L.R.B. 534, 551-552 (1982); *Dunn Bros., Inc.*, 235 N.L.R.B. 1032, 1043 (1978); *Marvin Witherow Trucking*, 229 N.L.R.B. 412, 412-413 (1977). Typically, as in this case, the Board excludes employees who live with or are otherwise financially dependent on a relative who owns or manages the business. *See, e.g., Pandick Press Midwest, Inc.*, 251 N.L.R.B. 473 (1980).

Of course, whether the employee enjoys special job-related privileges, in addition to a family relationship with an owner of the business, remains relevant to determining the unit inclusion issue. *See, e.g., Holthouse Furniture Corp.*, 242 N.L.R.B. 414, 415-416 (1979); *Modern Mfg. Co.*, 261 N.L.R.B. 534, 551-552 (1982). Thus, where application of the *Caruvelle* criteria shows that an employee-relative is not aligned with management by virtue of the family relationship, the existence of a special job status is necessary to exclude the employee from the unit. *See, e.g., Toyota Midtown, Inc.*, 233 N.L.R.B. 797 n.3 (1977) (married, financially independent son of vice-president, no special privileges, included in the unit). Similarly, the Board excludes relatives of managers with no ownership interest in the business only where special job status is shown. *See, e.g., Weyerhaeuser Co.*, 211 N.L.R.B. 1012, 1012-1013 (1974); *Novi American, Inc.-Atlanta*, 234 N.L.R.B. 421, 421-422 (1978).

The Ninth Circuit in *Linn Gear Co.* v. *NLRB*, 606 F.2d 791, 796 (1979), and the Fifth Circuit in *NLRB* v. *Patterson & Son, Inc.*, 636 F.2d 1014, 1017 (1981), have expressly approved the holdings of the Seventh Circuit in *Caruvelle I* and *II* and "follow a 'community of interest' test in determining the appropriateness of a bargaining unit." 636 F.2d at 1017; 606 F.2d 796. In those circuits, the Board can exclude an employee if he is more closely aligned with management than with other employees, regardless of whether the reason is job-related or family-related or both.[9] The Board's findings in the present case plainly meet the standards for exclusion adopted in the foregoing cases by the Fifth, Seventh, and Ninth Circuits, and those courts of appeals accordingly would have enforced the Board's order that was denied enforcement here.

2. Moreover, the decision below is fundamentally inconsistent with this Court's decisions upholding the Board's broad discretion under Section 9(b) to determine appropriate bargaining units. *See, e.g., South Prairie Construction Co.* v. *Operating Engineers*, 425 U.S. 800, 805 (1976); *Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 171 (1971); *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 491 (1947).

The Sixth Circuit's attempt to restrict the Board's discretion is based on the rationale in *NLRB* v. *Sexton*, *supra*. Noting that Section 2(3) of the Act "specifically excludes a spouse or child of an individual employer

[9] These courts have added the following factors to those listed in *Caruvelle I*: " '(1) the activity, if any, of the employees in the Union (2) the total number of employees as against the number of blood related employees and (3) the overall ties and social activities of the family involved.' " *Linn Gear*, 606 F.2d at 794; *Patterson*, 636 F.2d at 1017.

• • • but provides for no other exclusion on the basis of family relationship," the court there concluded (203 F.2d at 940):

> The Act, therefore, having expressly set forth the individuals who are excluded from the term "employee" on the basis of family relationship, we find no justification for the exercise of discretion on the part of the Board, by virtue of Section 9 of the Act, to exclude from the appropriate bargaining unit and from participation in the election • • • any persons on the basis of family relationship other than those specifically excluded under Section 2(3).

Accord: *NLRB* v. *Hubbard Co.*, 702 F.2d 634, 636 (6th Cir. 1983).

But this is not a valid basis for limiting the Board's Section 9(b) authority to determine "the unit appropriate for the purposes of collective bargaining." If an individual is excluded under Section 2(3), he is denied all protection under Section 7 of the Act; he may be discharged for union activity and he has no right to representation in *any* unit. Simply because an individual is an "employee," notwithstanding a family tie to the employer, and therefore is protected by Section 7, is not determinative of whether the individual should properly be included in a bargaining unit[8]—as the court below itself implicitly recognizes by permitting such persons to be excluded if they enjoy special job-related privileges.[9] The court of appeals' reliance on Section

[8] Thus, in *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. at 178, this Court held that, "In fulfilling its statutory obligation to determine appropriate bargaining units under § 9 of the Act, 29 U.S.C. § 159, for which broad discretion has been vested in the Board," the Board, for policy reasons, properly excluded from bargaining units employees with access to confidential, labor relations information.

[9] The court's rejection of the Board's finding that Diane Salo enjoys a special job-related status with respondent, however, strongly suggests that it will be particularly difficult for the

2(3) as an implied restriction on Section 9(b) is thus misplaced.

3. Not only is the Sixth Circuit's "special job status" requirement for exclusion from a bargaining unit not compelled by Section 2(3) of the Act, it also significantly undermines the Board's attempt to respect and effectuate important policies underlying other provisions in the Act. Thus, in deciding to exclude close relatives of an owner who is active in the day-to-day management of a business, the Board has concluded that employee-relatives are likely to "get a more attentive and sensitive ear to their day-to-day and long-range work concerns than would other employees. While this accessibility to management may not always result in easily identifiable special privileges or favorable working conditions, the fact that they have this peculiar access gives them a status and area of interest not shared by the rest of the employees." *Parisoff*, 201 N.L.R.B. at 814. This "access" lessens the likelihood that they would vote in favor of union representation; since they have an effective avenue of access to management, their perceived need for a collective representation to provide such access is limited.

In addition, an employee-relative who is financially dependent on the owner, who in turn is financially dependent on his company, will be motivated by very different factors than other employees in deciding whether to vote for a union. In a small family-held business, allowing close relatives to participate in the decision to select or reject a union may result, as in this case, in depriving other employees of representation by the bargaining agent of their choice. See *Pargas of Crescent City, Inc.*, 194 N.L.R.B. 616, 617 (1971) (dis-

Board to exclude employee-relatives from bargaining units within the Sixth Circuit. The decision below therefore stands as a substantial obstacle to the Board's proper effectuation of its duties under Section 9(b).

senting opinion of Member Jenkins), quoted in *Caravelle II*, 504 F.2d at 1187-1188. Thus, unlike the court's decision, the Board's rule fully respects the Section 7 rights of the employees. See *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U.S. 146, 165 (1941).

The importance of the issue in this case, however, goes far beyond the instances where the employee-relative may be the swing vote in the representation election. Whenever the union wins, if a close relative has been included in the bargaining unit, "her future participation in union matters would necessarily be suspect and possibly divisive." *Pargas of Crescent City, Inc.*, 194 N.L.R.B. at 617 (Member Jenkins, dissenting).[8] Nor is this a trifling concern; "[i]n the adversary system which our labor laws envision, neither management nor labor should be forced to accept a potential fifth column into its ranks." *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. at 193 (Powell, J., dissenting).[9] Since the Board's "community of interest" rule fully effectuates

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[8] Member Jenkins further elaborated the point in ways that seem strikingly relevant to Diane Sabo's situation, if the unions were elected (194 N.L.R.B. at 617-618):

> Her presence at union meetings would, considering the likelihood of her conveying information to the Employer (her husband, the only employer official at this facility), inhibit adequate and accurate expression of views and freedom of action on the part of the membership; and even if it did not, communication of such internal matters could effectively undermine or impair the ability of the Union to achieve its legitimate goals.

[9] The Board's rule also protects management. By excluding family members who have unusual access to the employer's confidential information, the Board makes it less likely that the union, in the event of a family squabble or a change in loyalties, would obtain from an employee-relative, materials or information to which the union is ordinarily not privy. The problem of such a potentiality for conflicting loyalties is especially pronounced in a case such as this one, in which both employees in question reside with owner-managers of the business.

the statutory policy favoring "efficient collective bargaining" by maintaining the line between labor and management, it should have been upheld by the court below. See *Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. at 172.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1984

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 82-1498/1644

ACTION AUTOMOTIVE, INC. PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Decided and Filed September 30, 1983

Before: LIVELY and JONES, Circuit Judges, and RUBIN, Chief District Judge.*

PER CURIAM. This case is before the Court upon Action Automotive's petition to review and the NLRB's cross-application to enforce the Board's order finding a refusal to bargain in violation of Sections 8(a)(5) and (1) of the NLRA. Petitioner argues that the Board improperly disqualified Mildred and Diane Sabo, relatives of the Company's co-owners, from voting in the bargaining units which elected the union as their bargaining representative. Upon consideration of the issues presented by this appeal, we agree and deny enforcement of the Board's order.

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*The Honorable Carl B. Rubin, United States District Court for the Southern District of Ohio, sitting by designation.

Petitioner, Action Automotive Inc., ("the Company") sells auto parts and gasoline through a number of retail outlets. The Company is owned in equal shares by three brothers, Richard, Robert and James Sabo. As president, vice-president and secretary respectively, the three brothers make all of the Company's policy decisions and are actively involved in its daily operation. On May 29, 1981, the Company's "store and warehouse employees" (Unit A) and "office clerical employees" (Unit B) conducted a secret ballot union representation election. The store and warehouse employees of Unit A voted twenty to eighteen for the union, with one challenged ballot. The clerical employees of Unit B voted four to three to join the union, with five challenged ballots. The union challenges the votes of Mildred Sabo in Unit A and Diane Sabo of Unit B. Their votes are relevant to this appeal because the union's majority status hinges upon whether the NLRB properly ruled that they were ineligible to vote.

Diane Sabo is the wife of Richard Sabo, the Company's president. She works as a general ledger clerk in the Company's Corunna Road office, under the supervision of Office Manager Lochman. All clerical workers except Diane receive an hourly wage. Diane is paid $100 per week and is expected to work between twenty and twenty-five hours, depending on business needs. Unlike the other clericals in Unit B, she is not required to punch a time card; rather, she records her hours on a form which is submitted to Lochman. The Board found that all clerical employees except Diane have scheduled fifteen minute paid breaks, and an unpaid lunch break. Diane takes her breaks whenever she so decides. Nevertheless Diane has been a paid clerical employee at the Company and its predecessor for eleven years. She works in the same area as other clericals and performs clerical functions for less pay per hour than her coworkers. The testimony before the Board indicates that

Diane's hours are flexible to accommodate family needs and health concerns. That flexibility is afforded other clerical workers as well.

Mildred Sabo is the mother of co-owners Richard, Robert and James Sabo. She resides with James Sabo and speaks to her sons daily. Mildred is a full-time cashier at the Company's South Saginaw street store. A senior member of the Company's cashiers, she earns $4.50 per hour. Other cashiers earn from $3.75 to $4.25 per hour. Mildred is supervised by store management and works in accord with the schedule posted and determined by that management. She records her time on a time card, while other employees punch a clock. In other respects, her working conditions and fringe benefits are similar to those of the other employees.

The question presented by these facts is whether Diane and Mildred Sabo enjoyed a "special status" at the work place which allied their interests with those of management. *NLRB* v. *Hubbard Co.*, 702 F.2d 634 (6th Cir. 1983); *Cherrin Corp.* v. *NLRB*, 349 F.2d 1001 (6th Cir.) *cert. denied*, 382 U.S. 961 (1966). This Court has clearly held that a finding of special status cannot be based solely on the existence of a familial relationship between employer and employee. *Cherrin*, 349 F.2d at 1004; *NLRB* v. *Sexton*, 203 F.2d 940 (6th Cir. 1953). We have explicitly rejected an expanded "community of interest" standard, whereby employees may be excluded solely for family ties. *Hubbard*, 702 F.2d at 636, n.2.

Rather familial ties can only be considered as evidence of a special status when the employee received job-related benefits or other favorable working conditions which flow from the relationship. *Hubbard*, 702 F.2d at 636; *Cherrin*, 349 F.2d at 1004-05. In *Cherrin*, this Court deferred to the Board's finding of a special status in a circumstance in which multiple benefits flowed to an employee by virtue of her familial relation-

ship to management. The employee was the daughter of the corporation's secretary and the niece of all the other officers and owners. As a result of this relationship, she was not required to punch a time clock, she was not a participant in the company's sick leave policy, she was not accountable for absences and she was never disciplined for tardiness. Although the *Cherrin* court deferred to the Board's order finding a special status, we found evidence of a special status to be "flimsy" and "thin," stating that we would have ruled differently had the matter been before us *de novo*.

More recently, in *Hubbard* we did rule differently and denied enforcement of the Board's finding of a special status. In that case, the challenged ballot belonged to Steven Hall, the son-in-law of the company's president and majority stockholder. Hall and his wife worked four, ten-hour days. No other employee of the company had ever worked that type of a shift. Unlike all other employees, the Halls worked without supervision during approximately two-thirds of their day. The special shift was established for the Halls' convenience. On these facts, the *Hubbard* Court found evidence of a special status insufficient to support the Board's findings. We held that "even if the schedule was established for Hall's convenience, this single instance of a special treatment does not constitute substantial evidence of a special status in this case." 702 F.2d at 636.

The clear import of the *Hubbard* decision is that a familial tie together with an instance of special treatment, does not warrant the legal conclusion of a "special status." We must decide therefore whether the facts presently before this Court provide greater indicia of a special status than those in *Hubbard*. After careful consideration of the record, we are unable to find sufficient evidence to support the finding of a "special status." The facts of the instant case are analogous to the facts in *Hubbard*. Diane Sabo's work schedule differed

significantly from that of her fellow employees. She is paid on a weekly basis, while other employees are paid on an hourly basis. The breaks and flexibility afforded Diane follow from her weekly work schedule. She receives no special privileges regarding her wages. We cannot say conclusively why Diane's work schedule is different than that of other clerical workers. But, even if that work schedule were established for Diane's convenience, our holding in *Hubbard* makes clear that this single instance of a special treatment is insufficient evidence of a "special status."

Furthermore *Hubbard* mandates that Mildred Sabo, perhaps more clearly than Diane, does not enjoy a special status. Mildred's working conditions are nearly identical to those of the other cashiers. She receives a larger hourly wage in accordance with her senior status. The only factor of Mildred's special status is her family ties to the Company. Our decisions indicate that such family ties alone are insufficient to establish "special status." *Hubbard*, 702 F.2d at 636; *Cherrin*, 349 F.2d at 1004-05. We conclude therefore that the Board's finding that Mildred and Diane Sabo enjoyed a special status so as to disqualify them from voting is not supported by substantial evidence on the record as a whole. *Harlan #4 Coal Co. v. NLRB*, 490 F.2d 117, 119 (6th Cir.) *cert. denied*, 416 U.S. 986 (1974).

Accordingly, enforcement of the Board's order is hereby DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 82-1498
82-1644

ACTION AUTOMOTIVE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

[Sept. 30, 1983]

JUDGMENT

Before: LIVELY and JONES, Circuit Judges; and RUBIN, Chief District Judge.

ON PETITION TO REVIEW and Cross-Application to Enforce a decision of the National Labor Relations Board.

THIS CAUSE came on to be heard on the transcript of record from the said Agency and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the Cross-Application for enforcement of the order of the said Agency in this cause be and the same is hereby denied.

It is further ordered that the Petitioner recover from the Respondent the costs on appeal, as itemized below, and that execution therefor issued out of said Agency, if necessary.

ENTERED BY ORDER OF THE COURT

/s/ _____

JOHN P. HEHMAN,
Clerk

APPENDIX C

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 7—CA—20341
262 NLRB No. 57

ACTION AUTOMOTIVE, INC.

AND

RETAIL STORE EMPLOYEES UNION, LOCAL 40, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO-CLC

DECISION AND ORDER

Upon a charge filed on February 22, 1982, by Retail Store Employees Union, Local 40, United Food and Commercial Workers International Union, AFL-CIO-CLC, herein called the Union, and duly served on Action Automotive, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 7, issued a complaint on March 4, 1982, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on January 11, 1982, in

Unit A, as described below, and on January 26, 1962, in Unit B, as described below, following a Board election in Case 7-RC-16322, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about February 8, 1962, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On March 12, 1962, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On March 19, 1962, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on March 30, 1962, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

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[1] Official notice is taken of the record in the representation proceeding, Case 7—RC—16322, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *Lit√ Electrosystems, Inc.*, 146 NLRB 989 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F. Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

RULING ON THE MOTION FOR SUMMARY JUDGMENT

In its answer to the complaint, Respondent admits the Union's request and its refusal to bargain, but denies that the Union was selected by a majority of the employees in either bargaining unit or that the Union is the exclusive collective-bargaining representative of the employees in either unit described below.

Review of the record herein, including the record in Case 7-RC-16322, reveals that on March 31, 1961, the Union filed a petition seeking to represent certain employees of Respondent. The parties executed a Stipulation for Certification Upon Consent Election which was approved on April 28, 1961.

On May 29, 1961, a secret-ballot election was conducted among Respondent's employees in the following appropriate units:

Unit A

All store and warehouse employees employed by the Employer at its nine stores (G-4273 Corunna Rd., Flint, MI; 3029 S. Dort Hwy., Burton, MI; 3097 N. Genesee Rd., Flint, MI; G-2499 Flushing Rd., Flint, MI; 1275 S. Center Rd., Burton, MI; G-5016 Clio Rd., Flint, MI; 302 S. Leroy, Fenton, MI; 514 W. Atherton, Flint, MI; G-4232 S. Saginaw St., Burton, MI); but excluding all office clerical employees, store managers, assistant store managers, guards and all other supervisors as defined in the Act.

Unit B

All office clerical employees employed by the Employer at its G-4273 Corunna Road, Flint, Michigan, facility; but excluding all store and warehouse employees, store managers, assistant store managers, guards, supervisors as defined in the Act and all other employees.

In Unit A, the tally was 20 for, and 18 against, the Union and there was 1 challenged ballot.[3] In Unit B, the tally was four for, and three against, the Union, and there were five challenged ballots. Thereafter, a hearing on the challenged ballots was held and on August 12, 1961, the Hearing Officer issued his report which recommended that, in Unit A, the challenge to the ballot be sustained and, in Unit B, that the challenges to three ballots be overruled, the challenge to one ballot be sustained, and as to the final challenged ballot, the employee was not eligible to vote in Unit B, but his ballot could be transferred to Unit A where that employee is eligible to vote. Respondent and the Union filed exceptions to the report. On January 11, 1962, the Board issued a Decision, Direction, and Certification of Representative[3] wherein it adopted the Hearing Officer's recommendations[4] but found it unnecessary to decide whether the ballot cast in Unit B could be transferred to Unit A since it would no longer be determinative in Unit A, the only other challenge in that unit having been sustained. Thus, on January 11, 1962, the Union was certified as the exclusive representative of all the employees described in Unit A, and on January 26, 1962, after the Regional Director for Region 7, as directed by the Board, opened and counted the overruled challenged ballots in Unit B, the Union was certified as the exclusive representative for all employees described in Unit B.

[3] The challenge to one of the ballots in Unit B was based on a contention that the employee was mistakenly included on the Unit B eligibility list, that the employee is eligible to vote in Unit A, and therefore the ballot should be transferred to Unit A. Accordingly, had the ballot from Unit B been transferred to Unit A, the one challenged ballot in Unit A could have been determinative.

[3] Not included in bound volumes of Board Decisions.

[4] In addition to the Hearing Officer's finding that Diane Sabo, the wife of the president and an owner of the Employer, did not share a community of interest with employees in Unit B, Members Jenkins and Zimmerman found that the evidence also established that she enjoyed special privileges. Member Hunter would have sustained the challenge to Sabo's ballot solely on the fact that she enjoyed special privileges.

In support of its "Motion in Opposition to the General Counsel's Motion for Summary Judgment," Respondent resubmitted its exceptions to the Hearing Officer's report and recommendations in Case 7—RC—16322.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[5]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgement.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

At all times material herein, Respondent, a corporation organized and existing by virtue of the laws of the State of Michigan, with its principal place of business located in Flint, Michigan, has been engaged in the retail sale of automotive parts and accessories and related

[5] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

products. During the year ending December 31, 1981, which period is representative of its operations during all times material hereto, Respondent, in the course and conduct of its business operations, had gross revenues in excess of $500,000, and had delivered to its Michigan places of business goods and materials valued in excess of $50,000, of which goods and materials valued in excess of $50,000 were transported and delivered to its places of business in Michigan directly from points located outside the State of Michigan.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Retail Store Employees Union, Local 40, United Food and Commercial Workers International Union, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. The Representation Proceeding

1. The unit

The following employees of Respondent constitute units appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

Unit A

All store and warehouse employees employed by the Employer at its nine stores (G-4273 Corunna Rd., Flint, MI; 3029 S. Dort Hwy., Burton, MI; 3097 N. Genesee Rd., Flint, MI; G-2499 Flushing Rd., Flint, MI; 1275 S. Center Rd., Burton, MI; G-5016 Clio Rd., Flint, MI; 302 S. Leroy, Fenton, MI; 514 W. Atherton, Flint, MI; G-4232 S. Saginaw St., Burton, MI); but excluding all office clerical employees, store managers, assistant store

managers, guards and all other supervisors as defined in the Act.

Unit B

All office clerical employees employed by the Employer at its G-4273 Corunna Road, Flint, Michigan, facility; but excluding all store and warehouse employees, store managers, assistant store managers, guards, supervisors as defined in the Act and all other employees.

2. The certification

On May 29, 1981, a majority of the employees of Respondent in said units, in a secret-ballot election conducted under the supervision of the Regional Director for Region 7, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in Unit A on January 11, 1982, and in Unit B on January 26, 1982, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. The Request To Bargain and Respondent's Refusal

Commencing on or about January 26, 1982, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described units.

Commencing on or about February 8, 1982, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said units.

Accordingly, we find that Respondent has, since February 8, 1982, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate

units, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate units and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate units will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate units. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Action Automotive, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Retail Store Employees Union, Local 40, United Food and Commercial Workers International Union, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees constitute units appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

Unit A

All store and warehouse employees employed by the Employer at its nine stores (G-4273 Corunna Rd., Flint, MI; 3029 S. Dort Hwy., Burton, MI; 3097 N. Genesee Rd., Flint, MI; G-2499 Flushing Rd., Flint, MI; 1275 S. Center Rd., Burton, MI; G-5016 Clio Rd., Flint, MI; 302 S. Leroy, Fenton, MI; 514 W. Atherton, Flint, MI; G-4232 S. Saginaw St., Burton, MI); but excluding all office clerical employees, store managers, assistant store managers, guards and all other supervisors as defined in the Act.

Unit B

All office clerical employees employed by the Employer at its G-4273 Corunna Road, Flint, Michigan, facility; but excluding all store and warehouse employees, store managers, assistant store managers, guards, supervisors as defined in the Act and all other employees.

4. Since January 11, 1962, in Unit A and January 26, 1962, in Unit B, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate units for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about February 8, 1982, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate units, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Action Automotive, Inc., Flint, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Retail Store Employees Union, Local 40, United Food and Commercial Workers International Union, AFL-CIO-CLC, as the exclusive bargaining representative of its employees in the following appropriate units:

Unit A

All store and warehouse employees employed by the Employer at its nine stores (G-4273 Corunna Rd., Flint, MI; 3429 S. Dort Hwy., Burton, MI; 3097 N. Genesee Rd., Flint, MI; G-2499 Flushing Rd., Flint, MI; 1275 S. Center Rd., Burton, MI;

G-5016 Clio Rd., Flint, MI; 302 S. Leroy, Fenton, MI; 514 W. Atherton, Flint, MI; G-4232 S. Saginaw St., Burton, MI); but excluding all office clerical employees, store managers, assistant store managers, guards and all other supervisors as defined in the Act.

Unit B

All office clerical employees employed by the Employer at its G-4273 Corunna Road, Flint, Michigan, facility; but excluding all store and warehouse employees, store managers, assistant store managers, guards, supervisors as defined in the Act and all other employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate units with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its nine stores as set out above copies of the attached notice marked "Appendix."* Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60

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* In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. June 24, 1982

HOWARD JENKINS, JR.,
Member

DON A. ZIMMERMAN,
Member

ROBERT P. HUNTER,
Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Retail Store Employees Union, Local 40, United Food and Commercial Workers International Union, AFL-CIO-CLC, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining units described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining units are:

Unit A

All store and warehouse employees employed by the Employer at its nine stores (G-4273 Corunna Rd., Flint, MI; 3029 S. Dort Hwy., Burton, MI; 3097 N. Genesee Rd., Flint, MI; G-2499 Flushing Rd., Flint, MI; 1275 S. Center Rd., Burton, MI; G-5016 Clio Rd., Flint, MI; 302 S. Leroy, Fenton, MI; 514 W. Atherton, Flint, MI; G-4232 S. Saginaw St., Burton, MI); but excluding all office clerical employees, store managers, assistant store managers, guards and all other supervisors as defined in the Act.

Unit B
All office clerical employees employed by the Employer at its G-4273 Corunna Road, Flint, Michigan, facility; but excluding all store and warehouse employees, store managers, assistant store managers, guards, supervisors as defined in the Act and all other employees.

ACTION AUTOMOTIVE, INC.
(Employer)

Dated_____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Patrick v. McNamara Federal Building, Room 300, 477 Michigan Avenue, Detroit, Michigan 48226, Telephone 313-226-3244.

APPENDIX D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 7-RC-16522

ACTION AUTOMOTIVE, INC., EMPLOYER

AND

RETAIL STORE EMPLOYEES UNION, LOCAL 40, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO-CLC, PETITIONER

DECISION, DIRECTION, AND CERTIFICATION OF REPRESENTATIVE

Pursuant to authority granted it under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered determinative challenges in an election held on May 29, 1981,[1] and the Hearing Officer's Report recommending disposition of same. The Board has reviewed the record in light of the exceptions and briefs, and hereby adopt the Hearing Officer's findings and recommendations.[2]

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[1] Elections in Unit A, the store and warehouse employees, and Unit B, the office clerical employees, were conducted pursuant to a Stipulation for Certification Upon Consent Election. In Unit A, the tally was 20 for, and 18 against, the Petitioner, with one challenged ballot which is not determinative. See footnote 2, *infra*. In Unit B, the tally was 4 for, and 3 against, with 5 challenged ballots.

[2] We agree with the Hearing Officer that Diane Sabo, the wife of Richard Sabo, who is president and an owner of Employer, is not eligible to vote in Unit B. However, contrary to the Hearing Officer, we find that her relationship to Respondent's president, her irregular work schedule, her breaks and lunches

DIRECTION

IT IS HEREBY DIRECTED that the Regional Director for Region 7 shall, pursuant to the National Labor Relations Board Rules and Regulations, Series 8, as amended, within 10 days from the date of this Decision, open and count the ballots of Geraldine Burns and John Stuyvis and thereafter prepare and cause to be served on the parties a revised tally of ballots for Unit B. In the event that the revised tally of ballots shows results determinative of the election, the Regional Director for Region 7 shall proceed to issue the appropriate Certification for Unit B.[8]

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with corporate officers in corporate offices, her being paid a salary rather than hourly pay, and not being required to punch a time clock evidences that she enjoys special privileges.

In adopting the Hearing Officer's recommendation to exclude Diane Sabo Member Hunter relies solely on the finding that in fact she does enjoy special privileges as outlined above.

The Hearing Officer found that maintenance employee Fred Britton who is ineligible to vote in Unit B, a clerical unit, shares a community of interest with employees in Unit A, and recommended that his ballot be transferred to Unit A. Inasmuch as Mildred Sabo, mother of Employer's three owners, is not eligible to vote in Unit A, Fred Britton's ballot could not be determinative in Unit A. Therefore, we find it unnecessary to decide whether Britton's ballot should be transferred.

[8] In the event that the revised tally of ballots in Unit B warrants the certification of Retail Store Employees Union, Local 40, United Food and Commercial Workers International Union, AFL-CIO-CLC, as the employee's exclusive representative, the appropriate unit is:

> All office clerical employees employed by the Employer at its G-4273 Corunna Road, Flint, Michigan, facility, but excluding all store and warehouse employees, store managers, assistant store managers, guards, supervisors as defined in the Act and all other supervisors.

CERTIFICATION OF REPRESENTATIVE

IT IS HEREBY CERTIFIED that a majority of the valid ballots in Unit A have been cast for Retail Store Employees Union, Local 40, United Food and Commercial Workers International Union, AFL-CIO-CLC and that, pursuant to Section 9(a) of the Act, the foregoing labor organization is the exclusive representative of all the employees in the following appropriate unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

> All store and warehouse employees employed by the Employer at its nine stores (G-4273 Corunna Rd., Flint, MI; 3029 S. Dort Hwy., Burton, MI; 3307 N. Genesee Rd., Flint, MI; G-2499 Flushing Rd., Flint, MI; 1275 S. Center Rd., Burton, MI; G-5016 Clio Rd., Flint, MI; 302 S. Leroy, Fenton, MI; 514 W. Atherton, Flint, MI; G-4232 S. Saginaw St., Burton, MI); but excluding all office clerical employees, store managers, assistant store managers, guards and all other supervisors as defined in the Act.

Dated, Washington, D.C., January 11, 1982.

HOWARD JENKINS, JR.
Member

DON A. ZIMMERMAN,
Member

ROBERT P. HUNTER,
Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX E

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

Case No. 7-RC-16822

ACTION AUTOMOTIVE, INC. EMPLOYER

and

RETAIL STORE EMPLOYEES UNION, LOCAL 40, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO-CLC PETITIONER

HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON DETERMINATIVE CHALLENGED BALLOTS AND EMPLOYER'S OBJECTIONS TO ELECTION

Upon a petition filed on March 31, 1981, and pursuant to a Stipulation for Certification Upon Consent Election executed by the parties and approved by the Regional Director for the Seventh Region of the National Labor Relations Board on April 28, 1981, an election by secret ballot was conducted on May 29, 1981, among the employees of the Employer in the following appropriate collective bargaining units:

Unit A
All store and warehouse employees employed by the Employer at its nine stores (G-4273 Corunna Rd., Flint, MI; 3029 S. Dort Hwy., Burton, MI; 3097 N. Genesee Rd., Flint, MI; G-2499 Flushing Rd., Flint, MI; 1275 S. Center Rd., Burton, MI; G-5016 Clio Rd., Flint, MI; 302 S. Leroy, Fenton, MI; 514 W. Atherton, Flint, MI; G-4232 S. Saginaw St., Burton, MI); but excluding all office

clerical employees, store managers, assistant store managers, guards and all other supervisors as defined in the Act.

Unit B
All office clerical emloyees employed by the Employer at its G-4273 Corunna Road, Flint, Michigan, facility; but excluding all store and warehouse employees, store managers, assistant store managers, guards, supervisors as defined in the Act and all other employees.

The payroll period for eligibility purposes was the bi-weekly period ending Thursday, April 23, 1981.

Upon conclusion of the election, copies of the Tally of Ballots, indicating the following results were served upon each of the parties in accordance with the current Rules and Regulations of the Board:

Unit A
Approximate number of eligible voters 39
Void ballots 0
Votes cast for Petitioner 20
Votes cast against participating labor organization 18
Valid votes counted 38
Challenged ballots 1
Valid votes counted plus challenged ballots 39

Unit B
Approximate number of eligible voters 12
Void ballots 0
Votes cast for Petitioner 4
Votes cast against participating labor organization 3
Challenged ballots 5
Valid votes counted plus challenged ballots 12

The challenged ballot in Unit A was not determinative of the final election results in that Unit. However, in light of the Employer's objections, set forth below, the challenged ballots in Unit B may impact on the results of Unit A.

The challenged ballots in Unit B were determinative of the final election results. Those ballots, as well as the challenged ballot from Unit A, have been segregated and maintained in a manner adequate to protect their secrecy.

On June 5, 1981, the Employer and Petitioner timely filed Objections, and each party simultaneously served a copy thereof on the other.[1] The Employer's objections are verbatim as follows:

> Action Automotive hereby files Objections to the Election in the above matter. Specifically, the Objections relate to the conduct of the Board Agent regarding computation of the Tally of Ballots in the Store-Warehouse unit (hereafter referred to as unit "A"). The Board Agent was informed prior to the count that some challenged ballots in the Office Unit Election involved employees who are clearly eligible, but some or all of whom should be voting in the unit "A". Nevertheless, the Board Agent after conclusion of the tally proceeded to indicate that the number of challenges were not determinative as they relate to unit "A". The tally in said unit was in favor of Petitioner by a 20 to 18 count with 1 challenge. Clearly the other challenges referred to above, which relate to proper placement are in fact determinative of the results.

The ballot of *Diane Sabo*, who voted in Unit B, was challenged by Petitioner, on the ground that she is the wife of Employer President Richard Sabo, and as such, is ineligible to vote. Contrariwise, the Employer contends that Diane Sabo is an eligible voter.

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[1] Petitioner's Objections parallel allegations contained in the Complaint in Case No. 7-CA-19182, wherein the same parties are involved. In the event the resolution of the challenges and objections herein does not render Petitioner's Objections moot, the Regional Director will issue an Order Consolidating Cases, and Petitioner's Objections will be heard by the Administrative Law Judge.

The ballot of *Geraldine Burns*, who voted in Unit B, was challenged by the Employer, which has changed its position and now contends that Burns is an eligible voter in Unit B. Contrariwise, Petitioner contends that Burns does not share a suficient community of interest with those employees in Unit B, and is ineligible to vote.

The ballot of *Fred Britton*, who voted in Unit B, was challenged by Petitioner, which contends that he does not share a sufficient community of interest with Unit B emloyees, but rather does maintenance work at all of the Employer's stores. Contrariwise, the Employer contends that Britton's vote should be counted, but in Unit A.

The ballot of *John Sturgis*, who voted in Unit B, was challenged by Petitioner, which contends that he does not share a sufficient community of interest as a salesman, with the employees in Unit B. Contrariwise, the Employer contends that Sturgis is an eligible voter in Unit B.

The ballot of *Mildred Sabo*, who voted in Unit A, was challenged by Petitioner, which contends that she is a relative of a member of management, and is ineligible to vote. Contrariwise, the Employer contends that Mildred Sabo is an eligible voter.

As there is some dispute over whether the ballot of *Fred Britton*, from Unit B, should be counted in Unit A (as raised by the Employer's Objections), there is the possibility that Mildred Sabo's challenged ballot may become determinative in Unit A. Accordingly, the Regional Director instructed the undersigned to take evidence on the eligibility of *Mildred Sabo*.

The ballot of *Debbie Croley*, who voted in Unit B, was challenged by the Employer, which contends that she resigned several weeks prior to the election. Contrariwise, the Petitioner contended that Croley was constructively discharged by the Employer in violation

of Section 8(a)(1) and (3) of the Act, and is therefore eligible. The original Notice of Hearing on Challenges and Objections issued by the Regional Director on June 19, 1981, instructed the undersigned not to take evidence at the hearing regarding the eligibility of Debbie Croley in view of the pendency of an unfair labor practice charge filed by Petitioner. Subsequently, on June 25, 1981 the Regional Director issued a Second Report on Challenged Ballots wherein he instructed the undersigned to hear evidence regarding Croley's eligibility status inasmuch as the unfair labor practice charge had been withdrawn.

Inasmuch as a preliminary investigation with respect to the objections and the determinative challenges established the existence of substantial and material factual issues, including credibility resolutions, the Regional Director for the Seventh Region of the National Labor Relations Board issued a Notice of Hearing on June 19, 1981. Thereafter, on July 6, 1981, a hearing was held before the undersigned for the sole purpose of resolving the issues raised by the objections and challenges.

The hearing was conducted in accordance with the provisions of Section 102.69(d) and (i) of the Board's Rules and Regulations, Series 8, as amended. All parties were represented and afforded full opportunity to be heard, to present and examine witnesses, to introduce relevant evidence, and to present oral arguments during the course of the hearing. Upon the entire record of the proceeding, the undersigned makes the following findings of fact, conclusions of law, and recommendations.

THE CHALLENGED BALLOTS

Debbie Croley and Geraldine Burns:

At the outset of the hearing the parties resolved two of the six challenged ballots through stipulation.

The parties stipulated that Debbie Croley is ineligible to vote in either unit A or unit B inasmuch as she resigned from employment with Action Automotive, Inc. prior to the elections which were conducted herein on May 29, 1981. In view of this stipulation, I recommend the challenge to the ballot of Debbie Croley be sustained.

The parties to this proceeding stipulated on the record that Geraldine Burns is eligible to vote in the office clerical unit (unit B) inasmuch as she is employed as a janitorial employee in the office area and thus shares a sufficient community of interest with the office clerical employees to warrant her inclusion in that unit. On the basis of this stipulation, I recommend the challenge to the ballot of Geraldine Burns be overruled and her ballot be opened and counted at an appropriate date.

Diane Sabo

The Employer, Action Automotive, Inc., is a corporation engaged in the servicing of the automotive aftermarket at and out of its facilities located in Flint and Lansing, Michigan. The Employer sells auto parts and gasoline at its various retail outlets. Additionally, at one of its locations, it also operates a five-bay service center. Moreover, the Employer services commercial accounts in addition to the aforementioned retail operations. Furthermore, the Employer functions as a warehouse entity through another company (JED) which provides the retail stores and outside customers with automotive supplies and parts. The employees of the Employer who voted in the store and warehouse unit (unit A) are employed by JED.

Action Automotive, Inc., is owned jointly by the three Sabo brothers, Richard, James and Robert. Each of the brothers owns a one-third interest in both Action Automotive, Inc. and JED. Richard Sabo is president of both entities, Robert is vice-president, and James is secretary-treasurer. The Sabo brothers, during the

course of the work day, are situated at the Employer's central office which is located on Corunna Road in Flint, Michigan. Richard Sabo testified at the hearing that he and his two brothers formulate wage rates, employee benefit packages, personnel policies and operational policies for the company. Richard Sabo further testified that he and his two brothers are all actively involved in the day-to-day operations of the corporation and routinely put in 80 hour work weeks in the performance of their various duties. Richard Sabo did note that once wages, benefits and personnel policies are set, the local supervision (store, warehouse, and office managers) are fully vested with authority for carrying out all such policies.

Diane Sabo is the spouse of, and resides with, Richard Sabo, President of Action Automotive, Inc. She does not own any stock in the corporation nor is she an officer.

Diane Sabo is employed on a regular part-time basis at Action Automotive, Inc. in the capacity of general ledger clerk in the Corunna Road office. All accounting flows into the general ledger which is the book through which financial statements are produced. Diane Sabo is under the direct supervision of Lawrence Lochman who also supervises other office clerical employees. Lochman determines Sabo's work schedule and will adjust it to suit the needs of the company. Diane Sabo is regularly scheduled in the office on Tuesdays and Thursdays of each week and for greater periods of time if the situation necessitates. Testimony adduced at the hearing indicated that although Diane Sabo's hours may vary from week to week, this is due to the scheduling which is determined by her supervisor. However, regardless of the variance, Diane Sabo is expected to work between 20 and 25 hours per week.

For her services in general ledger clerk duties, Diane Sabo is paid a salary of $100 per week. Testimony at

the hearing revealed that she receives this salary regardless of the number of hours she works in a given week. Richard Sabo testified at the hearing that his wife does not punch a time card (which all other office clerical employees are required to do), but rather writes her time on a card which is thereafter submitted to Supervisor Lochman.

There was testimony introduced at the hearing that Diane Sabo takes work home. However, witnesses provided by the Petitioner admitted that other office clericals also take work home and are paid for such time spent on work at home. Further, there was testimony that Diane Sabo is permitted to leave work early to take her children home from school. However, Petitioner witness Hildebrandt testified that there are other office clericals who leave work early for various reasons including health matters or family needs. Further, testimony adduced at the hearing revealed that Diane Sabo is not on the break schedule but rather takes her break when she deems it appropriate. There was further testimony that Diane Sabo sometimes goes out to lunch with Richard and Robert Sabo, which is not done by other office clericals. Moreover, the record disclosed that Diane Sabo takes her breaks in Richard Sabo's office, which is located at the same facility where she is employed.

Petitioner would argue that Diane Sabo enjoys special privileges due to her irregular work schedule, not punching a time clock, being paid on a salary rather than hourly basis, and her taking breaks and lunch with corporate officers. While I do not conclude these factors result in Diane Sabo enjoying special privileges, it is my conclusion that these factor do support a finding that Diane Sabo lacks a community of interest with the office clerical employees of unit "B".

The Board has repeatedly held that under particular circumstances, relatives of individuals who have a sub-

stantial stock interest in a closely held corporation, have interests more closely identified with management than with their fellow employees and are, therefore, excluded from the bargaining unit and are ineligible to vote in the election. *See Economy Cash Stores, Inc.*, 202 NLRB 930; *Pariaff Drive-In Market, Inc.*, 201 NLRB 813; *Cerni Motor Sales, Inc.*, 201 NLRB 918; and *Foam Rubber City #8 d/b/a/ Scandia*, 167 NLRB 623. In the instant case, the challenged employee's spouse, Richard Sabo, is a substantial stockholder of the corporation and its president, as well as an administrative officer involved in the overall operation of the business. Even assuming, *arguendo*, that Diane Sabo does not have any discernible privileges or special favors as a result of her consanguinal relationship to management, it is, as noted by the Board in *Economy Cash Stores, Inc., supra.*, at page 931, a "virtual certainty that such individuals would get a more attentive and sensitive ear to their day-to-day and long-range work concerns than would other employees ... (and) ... the fact that they have this particular access (to management) gives them a status and area of interest not shared by the rest of the employees."

In *Cerni Motor Sales, Inc., supra.*, the corporation involved was owned entirely by two brothers, each of whom held 50 percent of the stock. The Board noted in that case that where an individual owns 50 percent or more of a closely held corporation, that individual is, for the purposes of Section 2(3) of the Act, the actual Employer of the employees. Similarly, in *Foam Rubber City #8, supra.*, the corporation at issue was jointly owned by two brothers. In that case the Board drew an analogy between a corporation owned by two individuals and a co-partnership, noting that while different in form, there was little difference in substance. The Board observed that the employing entity consisted solely of two brothers who owned all of the stock in the

corporation and handled all administrative and managerial duties, and concluded that the two brothers were the real employer of the employees. In *Pariaff Drive-In, supra.*, the Board found an individual to be ineligible to vote in the election, even though his father owned only 20 percent of the stock in the corporation. The Board noted, however, that all of the stock in the corporation was owned by relatives of the challenged voter and consequently inasmuch as all owners were members of the same family and related to one another, as well as to the employee, the business interests of the corporation were more synonimous with the interest of the family to which the employee belonged.

Applying this line of cases to the instant proceeding, I note that the Action Automotive, Inc. is totally owned by three brothers who formulate all administrative, managerial, personnel, and labor relations policies for the corporation. The challenged voter is married to, and resides with, the president of this family-held corporation. She is employed at the same facility as her spouse and has social interaction with him at breaks and lunch time. In view of the foregoing I conclude that Diane Sabo has a community of interest separate from that of the office clerical employees in unit B and therefore I recommend the challenge to her ballot be sustained.

Mildred Sabo

Mildred Sabo is the mother of Richard, Robert and James Sabo. She is not an owner nor is she an officer in Action Automotive, Inc. Mildred Sabo resides with her son, James Sabo, in his house. Evidence adduced at the hearing revealed that although she lives with her son, she provides groceries for the family, owns the furniture and is responsible for the maintenance of the household.

Mildred Sabo is employed on a full-time basis in the capacity of cashier at the Employer's South Saginaw

Street store which is the Employer's largest retail operation. At this store, Mildred Sabo is under the direct supervision of the store manager and assistant store manager and works in accordance with the schedule posted and determined by local management. The record revealed that Mildred Sabo's benefits are identical to those enjoyed by other employees. Mildred Sabo receives $4.50 per hour for her services. Richard Sabo testified at the hearing that the cashiers employed at the various stores make between $3.75 and $4.25 per hour. Mildred Sabo is not required to punch a time clock as are other employees in her store and at the other stores, but rather she records her time on a time card. The Employer contends that Mildred and Diane Sabo formerly worked for a predecessor employer to Action Automotive, Inc. and under that employer the procedure called for employees to record their times on time cards rather than punch a clock. Accordingly, the present procedure with respect to Mildred and Diane Sabo is a carry-over practice from a time when time clocks did not exist at the prior employer's facility. The Employer does argue that Mildred Sabo's time is nonetheless verified by local store supervision.

The Petitioner introduced witnesses who testified that in their estimation Mildred Sabo receives certain special privileges which are not enjoyed by other cashiers and employees at the Saginaw Street store. These witnesses testified that Mildred Sabo is not required to follow the company dress code, shows up late for work, and is not required to perform certain duties which other cashiers are required to perform, notably, the stocking of shelves, dusting of shelves, and inventory work. Petitioner witnesses further testified that Mildred Sabo is granted excessive use of the telephone and missed at least one required employee meeting.

Mildred Sabo testified at the hearing with regard to the aforementioned matters. She contended that she

does not show up late for work, that she does attend virtually all required meetings and that she does conform to the Employer dress code. Moreover, she argued that she does in fact perform the non-cashier duties, i.e., stocking shelves, etc. Mildred Sabo further testified she has received four written warnings from management for the following conduct: Showing up late for work, not conforming to the dress code, missing one store required meeting, and talking excessively on the telephone. She argued that she is expected to perform the same duties as all other cashiers and that she is not afforded any special privileges or excluded from any responsibilities or requirements to which other cashiers are held.

Mildred Sabo did testify at the hearing that she lives only 10 to 15 minutes away from her sons Richard and Robert and sees them often outside of work for social occasions. Additionally, I note there was testimony at the hearing that Mildred Sabo would, on a daily basis, call the central office and speak with one or more of her sons during the course of a work day.

I conclude from the record that insufficient evidence exists to establish that Mildred Sabo receives special privileges due to her relationship to the three owners of Action Automotive. It is clear that she has a higher wage rate than other cashiers and she is permitted to record her time on a card rather than punching in and out as other employees are required to do. However, the evidence was inconclusive regarding her adherence to the company dress code, attendance at company meetings, and the performance of her day-to-day work duties. In this latter regard, I note that Petitioner did not present witnesses who work on Mildred Sabo's shift who might have given an independent analysis of what Mildred Sabo does, or does not do, in the performance of her day-to-day cashier duties. Inasmuch as this evidence was lacking, I have little choice but to rely on the

testimony of Mildred Sabo that she performs all of the day-to-day work duties and responsibilities which all cashiers perform.

Notwithstanding the absence of special privileges, I conclude that Mildred Sabo is ineligible to vote in unit A. I note that Mildred Sabo is the mother of the three sons who collectively own 100% of the corporation. Moreover, all three of the sons are actively involved in the day-to-day operations of the business. Further, Mildred Sabo lives with one of her three sons who is a corporate officer and stockholder in the corporation. Additionally, Mildred Sabo testified that she lives about ten or fifteen minutes from her other two sons and socializes frequently with her sons and their families. I also note that there was testimony introduced at the hearing that Mildred Sabo telephonically communicates with her sons on a daily basis while at work.

It is clear, in my estimation, that Mildred Sabo's interests are more closely aligned with management than with the employees of Action Automotive, Inc. In view of her relationship to Richard, Robert and James Sabo. In this regard, I note the case law and rationale set forth in that portion of this report concerning the eligibility status of Diane Sabo. Further, the Board has held in numerous cases that the interests of a parent of a corporate principal are such as to make him or her ineligible to vote in an election conducted. See *Lucmar's Foods, Inc.*, 206 NLRB No. 4; *Wesco Electrical Company*, 202 NLRB 479; *Save-U-Stores, Inc.*, 225 NLRB No. 7. In *Marvin Withorow Trucking*, 229 NLRB 412, the Regional Director found the father of a sole proprietor to be ineligible on the basis of special status. The Board upheld the Regional Director's ruling but for different reasons. Contrary to the Regional Director, the Board found special status did not exist but rather the Board found the father was ineligible due to the fact that he had a community of interest separate from that

of his fellow employees. The Board noted in that case that:

> In view of the familial bond existing between father and son herein, we are of the opinion that William Withorow (the father) would have a greater affinity with the interests of management than he would with the interests of his fellow employees. It would contradict human experience to contend that the relationship between William and Marvin Withorow is merely that of employer and part-time employee. While this relationship may not always result in easily identifiable special privileges or working conditions, it establishes an area of interest not shared by the other employees.

In light of the foregoing, I conclude that Mildred Sabo is not eligible to vote in the election conducted in unit A and accordingly recommend that the challenge to her ballot be sustained.

John Sturgis:

John Sturgis is employed by the Employer as its sole sales representative. For his services, he receives a salary of $300 per week plus a commission which routinely amounts to $50 per week. Sturgis is a salaried employee and does not punch a time clock. Richard Sabo testified that, like other employees, Sturgis does not get paid if he does not work. If he is ill or does not work a holiday, his salary will be reduced. Testimony at the hearing indicated that Sturgis received the same benefits afforded to other employees who voted in unit B.

In the performance of his sales duties, Sturgis will call upon established warehouse accounts and potential new customers. He takes orders for the JED warehouse and also provides services for the aforementioned customers. Sturgis performs his duty in a territory encompassing a 50 to 75 mile radius from Flint, Michigan. While performing his sales functions, Sturgis travels approximately 2000 miles per month servicing these

various commercial accounts. In so doing, Sturgis utilizes his own automobile for which he is compensated a flat $250 per month. Sturgis is under the supervision of the Employer's warehouse and store operations managers.

Sturgis is employed by the Employer Monday through Saturday each week. Typically during the course of a normal work week, Sturgis will report for work at the office early in the morning and attend to certain paperwork functions relating to his sales duties. Sturgis testified that he spends anywhere from one to four hours each morning in the office area performing the aforementioned functions. Sturgis indicated that he tries to leave the office by 9:00 a.m. each morning in order to conduct his various sales activities, but in most cases, he departs later than 9:00 a.m. Sturgis' testimony with respect to the number of hours he spends in the office was quite confusing. However, it appears from all of the testimony that he averages approximately two hours per day in the office each weekday morning. On Saturdays of each week, Sturgis is employed for eight hours in the office area. Prior to June of this year, his Saturday duties consisted of answering the telephone and acting as the office receptionist. In June of this year certain other office clerical employees commenced working half days on Saturdays and Sturgis' receptionist duties were reduced.

While employed in the office area, Sturgis occupied a desk in an office directly behind the receptionist area and adjacent to the data processing section where eligible office clerical employees are situated. Presently several supervisory personnel share this office with Sturgis, however, testimony adduced at the hearing indicated that a former data processing clerk was situated at the desk Sturgis currently occupies.

During the course of a work week, Sturgis contended that he will at times assist the warehouse by unloading

trucks and pulling orders. He contended that he spends approximately one hour per day each week day performing these warehouse duties. Additionally, Sturgis pointed out that on one Saturday per month, he will spend from three to four hours working in the warehouse. Sturgis noted that he dressed in casual clothes when reporting each Saturday in contrast to the suit and tie he wears during the week while performing his sales functions. Sturgis also noted that he will on occasion deliver an order to one of the stores after he has pulled the order from the warehouse. Under cross-examination, Sturgis conceded that a goodly part of his warehouse functions were to pull orders and deliver orders to accommodate his various sales customers.

It is clear that Sturgis does his own typing, filing, and maintenance of records with respect to his sales accounts. However, Sturgis did concede that he does no billing, data processing or payroll work, which are duties performed by the various eligible voters in the office clerical unit. The Employer argues that there is a degree of functional integration in that certain office clerical employees do take sales orders over the phone and at least one office clerical on infrequent occasions will process new customer accounts. However, the record substantially reveals that Sturgis does virtually no office clerical duties and that the office clerical employees do very little, if any, sales work.

Despite John Sturgis' on-the-record assertions that he is a warehouse employee, the record is devoid of evidence supportive of a finding that he should be placed in unit A. Sturgis' day-to-day work duties and responsibilities differ markedly from those of the warehouse employees. Moreover, he is not located in the warehouse area, nor is his mode of dress in any manner similar to that worn by the warehouse employees. While there was testimony that Sturgis does perform some warehouse duties, these duties are at best irregular and

sporadic in nature. Moreover, it is my conclusion that while Sturgis does at times go to the warehouse and pull orders, he does so not as a warehouse employee but rather as a corollary function of his sales duties in order to accommodate the special needs of his customer accounts.

There is no question that Sturgis' day-to-day duties and responsibility as a sales representative vary from the work performed by office clerical employees in unit B. However, notwithstanding this variance, it is my conclusion that Sturgis shares a sufficient community of interest with the office clerical employees in unit B to warrant his inclusion in that unit. In this regard, I note that a portion of each day (approximately 15-20 hours per week) Sturgis shares a common work situs with unit B employees, enjoys the same general working conditions, is covered by the same health insurance plan, and, so far as the record reflects, receives similar fringe benefits. Moreover, if Sturgis is excluded from this unit he would be the only unrepresented non-supervisory employee in the office and thus would effectively be denied the opportunity to be represented in collective bargaining; see *South Carolina Education Association*, 240 NLRB 542; *Victor Industries Corporation of California*, 215 NLRB 48; *Standard Brands, Inc.*, 175 NLRB 734. Moreover, that Sturgis' day-to-day duties vary from those performed by other unit employees is not dispositive of the community of interest issue. In this regard I note the parties stipulated that Geraldine Burns shares sufficient community of interest to warrant her inclusion in this office clerical unit notwithstanding the fact that she is a janitorial employee and performs no office clerical functions. Accordingly, in light of the foregoing I recommend the challenge to the ballot of John Sturgis be overruled and that he be found eligible to vote in the office clerical unit.

Fred Britton

Fred Britton is employed by Action Automotive, Inc. in the capacity of maintenance employee. His duties are performed almost exclusively at the Employer's warehouse and various stores. Typically, Britton is given a list of repair work which is to be performed based upon repair orders submitted by either the stores or the warehouse. He will then go to the warehouse or the various stores and perform the maintenance work. Work performed by Britton includes replacing broken windows, repairing damaged shelves and other types of general maintenance work.

Britton has been employed by this Employer and its predecessor companies for approximately 10 years. He works on a full-time basis and receives $5.00 per hour for his services. Additionally, Britton is entitled to, and receives, overtime pay. Britton will, at times, punch a time clock. However, there are many occasions on which he will not punch a time clock, ostensibly due to where he reports for work on a given day. The Employer would also argue that Britton not punching a time clock is a carryover from his employment with predecessor companies which did not have time clocks. Britton is under the direct supervision of Store Operations Manager David Scigliano and is also supervised to a certain extent by Robert Sabo who oversees all warehouse operations. These two supervisors assign work to Britton and are responsible for verifying his work hours.

The supplies with which Britton performs his maintenance work are located in the Employer's warehouse. Additionally, Britton keeps his own personal tools, utilized in performing his maintenance work, at the warehouse facility. When Britton is not performing the various maintenance functions described above, he works in the warehouse performing identical functions to those performed by warehouse employees. Testimony ad-

duced at the hearing indicated that Britton spent approximately 80% of his time performing the aforementioned maintenance work and the remaining 20% of his time he works as a warehouse employee. While performing this warehouse work, Britton is involved in unloading and loading trucks, checking in orders, pulling orders, and operating various warehouse equipment. Moreover, Britton, like the other store and warehouse employees, is involved in inventory work at both the warehouse and the stores.

Britton does not peform any office clerical functions. Moreover, Britton does not work at or around the Corunna Road office area. The only time when Britton might be in the office area would be if he were repairing a window, partition or some other item in the office. The parties stipulated at the hearing that Fred Britton does not share a community of interest with the office clerical employees inasmuch as he does not perform office clerical duties. Accordingly, the parties stipulated that Britton is ineligible to vote in unit B, which is the office clerical unit.

The Employer contends that Britton belongs in unit A, the store and warehouse unit. The Employer argues that Britton was inadvertently placed on the election eligibility list with respect to unit B, the office clerical unit. Britton testified at the hearing that he saw election notices posted at the Employer's premises, both with respect to unit A and unit B, however, he did not read these notices in order to ascertain in which unit he should vote. Britton contended that on the date of the election he was at the Employer's warehouse for the purposes of performing certain painting functions. At aproximately 11:00 a.m., he observed a voting line as he was on his way to a restaurant and decided then to vote. The voting line which Britton saw was for unit B, the office clerical unit, wherein he did in fact vote under challenge. Britton testified that he did not know the

distinction between units A and B and did not know on which list his name appeared. Britton testified that he did not attend any pre-election meetings wherein the election was discussed nor did he discuss the matter of which unit he should vote in with either Petitioner or Employer.

The testimony adduced at the hearing amply supports the parties stipulation relative to excluding Fred Britton from the office clerical unit. In view of this, I recommend that Britton be found not eligible with respect to the election conducted in unit B, the office clerical unit.

The parties are in disagreement as to whether or not Britton should be placed in unit A. It is uncontroverted that Britton's name was placed on the election eligibility list in the office clerical unit and that he thereafter voted in that unit. The placement of Britton's name on this eligibility list is certainly not dispositive of the issue. The Board has noted that the mere preparation and checking of such an eligibility list does not constitute an agreement that precludes the possibility of challenges at the election either with respect to names appearing on, or names omitted from such a list. The election eligibility list is regarded as "a guide or tool the use of which is to facilitate the election procedure," *O. Z. Saxkley and Associates*, 117 NLRB 42. Parties to an election agreement may enter into a written and signed agreement which expressly provides that the issues of eligibility resolved therein shall be final and binding upon the parties. See *Norris-Thermador Corporation*, 119 NLRB 1301. Once parties have entered into such a "*Norris-Thermador*" agreement, the fact that an employee was inadvertently excluded from the list through "inadvertence" would not render that employe an eligible voter. See *Pyper Construction Co.*, 177 NLRB 707. However, when there is nothing in the election agreement indicating that there is an agreed-

upon list stipulated to be final and binding on the parties, the document as it stands does not sufficiently reveal an intent on the part of the parties to be bound within the meaning of the *Norris-Thermador* rule. See *Federal Prescription Service, Inc., and Drive-X Company*, 203 NLRB No. 145. In sum, it is well settled in Board law that absent the parties entering into a *Norris-Thermador* list, whether or not an employee is eligible to vote is determined not by the fact that he or she may have been included or excluded from an eligibility list, but rather what is his or her place in an appropriate unit.

It is my conclusion that the preponderance of evidence introduced at the hearing supports a finding that Fred Britton does in fact share a sufficient community of interest with the store and warehouse employees to warrant his inclusion in voting unit A. In this regard, I note that Britton spends approximately 80% of his work time at the warehouse and/or stores performing maintenance work in areas occupied by store and warehouse unit employees. Moreover, he spends 20% of his time performing identical work functions to those performed by the warehouse employees. In addition to common situs and common duties, Britton's wage rate, hours and benefits are all similar to those of employees employed in the store and warehouse. Indeed, in this regard, I note that Petitioner does not argue, nor did it introduce any evidence indicating, that Britton's community of interest does not lie in unit A.

The sole issue before me is whether or not a ballot which was cast in unit B can somehow be "transferred" to unit A. This is indeed a most unusual circumstance an I note that there is a veritable dearth of case law in this area. However, by analogy it is my belief the ballot can, in fact, be transferred. The election conducted in unit A was multi-location in nature. The employees voted at their respective stores and election eligibility

lists were maintained for each of the locations. Had any employee, who is appropriately employed in the unit A bargaining unit, inadvertently voted at a store other than his or her home store (where his/her name would have been on the eligibility list) that employee would have been challenged by the Board Agent conducting the election. Thereafter, the parties would have been consulted and once it was determined the person was appropriately employed in the unit, and had not voted at another location, that ballot would have been opened and counted. It is my belief that under this analogy Britton's ballot can be transferred from one unit to the other. I note in this regard that Petitioner is the union involved in both units and that the question on the ballot in both of the units is identical. Consequently, it is my belief that if Britton were found not to be eligible by virtue of his voting in the wrong unit, this would constitute form over substance. Accordingly, I recommend that Britton be found eligible in voting unit A.

RECOMMENDATIONS

For the reasons previously enunciated, I recommend the challenges to the ballots of Debbie Croley, Diane Sabo and Mildred Sabo be sustained. Further, I recommend the challenges to the ballots of Geraldine Burns, John Sturgis and Fred Britton be overruled.

THE OBJECTIONS

At the Hearing the Employer did not proffer any evidence in support of its objections. Consequently, there is little more I can discuss other than what is before me and that is the specific objection itself. Apparently the Employer took issue with the fact that the Board Agent

conducting the election filled out the Tally of Ballots so as to indicate that there were no determinative challenges in Unit A when, in the opinion of the Employer, it felt determinative challenges were in existence. This objection was disposed of by the Regional Director's Notice of Hearing dated June 19, 1961. In that Notice of Hearing the Director expressed cognizance of the Employer's position relative to the challenged ballots in both units and directed the undersigned to hear evidence on the objection and on the challenged ballots. Consequently, no Certification of Representative issued. The only circumstances under which the Employer's position herein could have been prejudiced, would be if the Regional Director had issued a Certification of Representative and refused to permit the undersigned to hear evidence regarding the potential "transference" of ballots. I make no finding as to whether or not the Board Agent erred in compiling the Tally of Ballots; however, even if such an error did occur, it was corrected by the Regional Director's Notice of Hearing dated June 19. Although the Board seeks laboratory conditions, in rare circumstances Board Agents do improperly fill out the Tally of Ballots. However, in those circumstances elections are not voided but rather a Corrected Tally of Ballots issues. Consequently, even if the Board Agent did make an error, in my estimation the Regional Director's June 19th Notice of Hearing is tantamount to a Corrected Tally of Ballots. Accordingly, I recommend the objection be overruled. Further I note that in view of my finding relative to the unit placement of Fred Britton, the Employer's objection appears moot at this point.

RECOMMENDATIONS

For the reasons previously enunciated, the undersigns recommends that the Employer's objections be overruled.[9]

Dated at Detroit, Michigan this 12th day of August, 1961.

/s/ HARVEY R. DAMBO

HARVEY R. DAMBO
Hearing Officer
National Labor Relations Board
Seventh Region
Patrick V. McNamara Federal Building
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Detroit, Michigan 48226

[9] Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this report may be filed with the Board in Washington, D.C. Exceptions must be received by the Board in Washington, D.C., by August 25, 1961.

RESPONDENT'S

BRIEF

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APR 28 1984
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No. 83-1416

IN THE

Supreme Court of the United States

October Term, 1983

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
ACTION AUTOMOTIVE, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE NATIONAL LABOR RELATIONS BOARD HAS AUTHORITY THROUGH ITS APPLICATION OF SECTION 9(b) OF THE NATIONAL LABOR RELATIONS ACT, 29 U.S.C. 159(b), TO AMEND SECTION 2(3) OF THE ACT, 29 U.S.C. 152(3), WITHOUT CONGRESSIONAL MANDATE, BY EXCLUDING RELATIVES OF OWNERS OF A CLOSELY HELD CORPORATION, IN THE ABSENCE OF EVIDENCE THAT SAID RELATIVES RECEIVE ANY JOB-RELATED PRIVILEGES.

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No. 83-1416

IN THE

Supreme Court of the United States

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NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER STATEMENT OF THE CASE

Respondent does not take issue with Petitioner's Description of the Opinions Below[1], its Jurisdictional Statement or its Statutory Provisions Involved. However, Petitioner's Statement of the Case is unacceptable since it is incomplete and at times inaccurate. A description of these defects and an attempt to cure them follows.

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[1] Petitioner has set forth the opinions below in full at pages 1a-47a of its Petition For a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit (hereinafter referred to as the "Petition"). References to the Petition will be designated as "Petition —"

For example, Petitioner states that the Sabo brothers make all policy decisions for Respondent. However, Petitioner fails to reveal that once wages, benefits and personnel policies are established, local supervision is fully vested with authority for implementing them. Petition 30a.

Similarly, Petitioner's description of the Hearing Officer's Recommendations are accurate. However, Petitioner's descriptions of his findings in regard to the terms and conditions of employment of Diane and Mildred Sabo are incomplete and inaccurate. Diane Sabo is the spouse of Richard Sabo, President of Respondent. However, she is not an officer and does not own any stock in Respondent. She is under the direct supervision of Lawrence Lochman who also supervises the other clerical employees. Lochman determines her schedule and adjusts it according to Respondent's needs. She is expected to work 20-25 hours per week. Petition 30a. Finally, the Hearing Officer did *not* find as alleged at page 3 of the Petition that Diane Sabo was the only clerical employee who works part-time. See Petition 30a-31a.

Mildred Sabo is neither an owner nor an officer of Respondent. She resides with her son James. However, she provides groceries for the family, owns the furniture and is responsible for the maintenance of the household. Petition 33a. At the Respondent's South Saginaw Street store where she works, she is under the direct supervision of the store manager and assistant store manager. She works in accordance with the schedule posted and determined by local management. While she does not punch a time card, it is simply a carryover practice from the predecessor employer. Moreover, her time is verified by local supervision. Finally, Mildred Sabo receives benefits which are identical to the other employees. Petition 34a.

Similarly, the Petitioner failed to disclose pertinent findings of the Court of Appeals. Specifically, in holding that Diane Sabo does not enjoy a special status, the Court noted that Diane works in the same area as other clericals and performs clerical functions for less pay per hour than her co-workers. Petition 2a. The Court also found that Diane's hours are flexible to accommodate family needs and health concerns and that such "flexibility is afforded other clerical workers as well." Petition 3a. Moreover, the Court concluded that the breaks and flexibility afforded Diane followed from her weekly work schedule. Petition 5a. The Court acknowledged that it could not say "conclusively why Diane's work schedule is different than that of other clerical workers." *Id.* Nevertheless, the Court concluded that "even if that work schedule was established for Diane's convenience, our holding in *Hubbard* makes clear that this single instance of special treatment is insufficient evidence of a 'special status'." *Id.*

REASONS FOR DENYING THE WRIT OF CERTIORARI

I.

THE DECISION OF THE SIXTH CIRCUIT BELOW REPRESENTS A PROPER APPLICATION OF THE NATIONAL LABOR RELATIONS ACT.

Petitioner contends that the Sixth Circuit's decision below is inconsistent with the National Labor Relations Act. Petitioner's application of the language and policies embodied in the Act is misplaced. As the analysis below reveals, the Sixth Circuit's holding is entirely consistent with the Act. The Seventh Circuit rule seized upon by the Petitioner for purposes of the Writ, on the other hand, cannot be reconciled with the language and policies embodied in the Act.

The Sixth Circuit rule requiring evidence that relatives receive job-related benefits or other favorable working conditions which flow from their familial relationship is consistent with Section 9(b) of the Act and the body of law which has developed under it.[3] Section 9(b) of the National Labor Relations Act grants the N.L.R.B. with authority to decide upon "the unit appropriate for the purposes of collective bargaining." 29 U.S.C. 159(b). In exercising this discretion, the Board is to include in a unit only those employees who share a community of interest. See *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 172-73, 92 S.Ct. 383, 394, 30 L.Ed.2d 341 (1971).

In *Kalamazoo Paper Box Corp.*, 136 N.L.R.B. 134, 137, 49 L.R.R.M. 1715 (1962), the Board enumerated the factors to be considered in determining the community of interest:

> [A] difference in method of wages of compensation; different hours of work; different employment benefits; separate supervision; the degree of dissimilar qualifications, training and skills; differences in job functions and amount of working time spent away from the employment or plant situs . . . ; the infrequency or lack of contact with other employees; lack of integration with the work functions of other employees or interchange with them; and the history of bargaining.

[3] The "special status" test applied by the Sixth Circuit below has also been followed by the Second, Eighth and Tenth Circuits. See *N.L.R.B.* v. *Connecticut Foundry*, 688 F.2d 871, 879 (2nd Cir. 1982); *N.L.R.B.* v. *Warner*, 587 F.2d 896, 902 (8th Cir. 1978) and *N.L.R.B.* v. *Jackson Farmer, Inc.*, 432 F.2d 1042 (10th Cir. 1970) cert. den. 401 U.S. 955 (1971).

Similarly, in its 1950 Annual Report, the Board stated that in resolving the unit issue "the Board's primary concern is to group together only employees who have substantial mutual interest in wages, hours and other conditions of employment." 1950 N.L.R.B. Ann. Rep. 39 (1951).

The Federal Courts of Appeals have adopted an identical community of interest standard. For example, in *Pacific Southwest Airlines* v. *National Labor Relations Board*, 587 F.2d 1032, 1042 (1978), the Ninth Circuit stated:

> The most reliable indicium of common interests among employees is similarity in their skills, duties, and working conditions. See *Allied Chemical & Alkali Workers of America, Local Union 1*, 404 U.S. at 172, 93 S.Ct. 383; NLRB, Fifteenth Annual Report 39 (1950); American Bar Ass'n, The Developing Labor Law 217-19 (C. Morris ed. 1971).

All of the criteria listed above are job-related. Accordingly, any exclusion of employees from a bargaining unit pursuant to Section 9(b) must be based on factors which are job-related. Therefore, the Sixth Circuit's special status test based on job-related facts is clearly consistent with Section 9(b).

In Section 2(3) of the Act, 29 U.S.C. 152(3), Congress established that individuals employed by their parents or spouses are not employees and, therefore, are not to be included in bargaining units, irrespective of their terms and conditions of employment. As Justice Rehnquist recently recognized in his opinion for a unanimous Court in *N.L.R.B.* v. *Bildisco and Bildisco*, ___ U.S. ___, 104 S.Ct. 1188, 1195 (1984), enumerated statutory exclusions are to be strictly construed:

> Obviously, Congress knew how to draft an exclusion for collective bargaining agreements when it wanted to; its failure to do so in this instance indicates that Congress intended that Section 365(a) apply to all collective bargaining agreements covered by the N.L.R.A.

Thus, if Congress had intended to exclude all relatives without regard to their terms and conditions of employment it would have so specified in Section 2(3). Since it is undisputed that the individuals at issue do not fall within the specific exclusion of Section 2(3)[3], their placement in the unit depends upon the job-related criteria which the Board and the courts have consistently applied under Section 9(b).

Permitting the Board to decide upon the unit placement of relatives without regard to job-related criteria is tantamount to an amendment of Section 2(3). As the Federal Court of Appeals have repeatedly recognized, the Board cannot amend Section 2(3) through the unit placement powers it has been granted under Section 9(b). For example, in *N.L.R.B.* v. *Sexton*, 203 F.2d 940 (1953), the Sixth Circuit stated:

> Section 2(3) of the National Labor Relations Act, as amended, 29 U.S.C.A § 152(3), sets forth what the term "employee" shall include, and specifically excludes a spouse or child of an individual employer as such an employee, but provides for no other exclusion on the basis of family relationship. The Act, therefore, having expressly set forth the individuals who are

---

[3] See Petition 7, n.3.

> excluded from the term "employee" on the basis of family relationship, we find no justification for the exercise of discretion on the part of the Board, by virtue of Section 9 of the Act, to exclude from the appropriate bargaining unit and from participation in the election for the selection of a bargaining agent any persons on the basis of family relationship other than those specifically excluded under Section 2(3).

Similarly, in *Lake City Foundry Company* v. *N.L.R.B.*, 432 F.2d 1162, 1167 (1970), the Seventh Circuit stated:

> In reality, the Board amended Sec. 2(3) so as to exclude not only "a spouse or child of an individual employer as such an employee" as Congress had done, but also "the children of individuals who have substantial stock interests in closely held corporations". The Board cites in support of its *Foam Rubber* decision *National Labor Relations Board* v. *Wyman-Gordon Co.*, 394 U.S. 759, 89 S.Ct. 1429, 22 L.Ed.2d 709. We think there is nothing in that opinion pertinent to the point. True, the court recognized, as we assume all courts do, that "Congress granted the Board a wide discretion to ensure the fair and free choice of bargaining representatives" (page 767, 89 S.Ct. at page 1430). The court did not authorize the Board to make rules in conflict with a statutory provision; . . .

In *N.L.R.B.* v. *Caravelle Wood Products, Inc.*, 466 F.2d 675, 678 (1972) (*Caravelle I*), the Seventh Circuit reiterated this point:

> We see no reason to give the Board total discretion under one section to accomplish what it cannot under another section.

• • •

> Considering the broad definition of "employee" used by Congress in section 2(3) and the critical interests of all employees in selecting their economic representatives, we believe section 9(b) is neither specific enough nor strong enough to support a grant of total authority to the Board to exclude relatives from a unit. (footnote omitted)

Finally, as Justice Stevens recognized in his concurring opinion while sitting as a Circuit Judge in *N.L.R.B.* v. *Caravelle Wood Products, Inc.*, 504 F.2d 1181, 1189 (7th Cir. 1974) (*Caravelle II*), the standard upon which Petitioner relies is not entirely consistent with the instructions of the Supreme Court:

> Subsequent to the decisions in Caravelle I, the Supreme Court reminded us that the statute is "wholly neutral" in requiring respect for those who oppose a union as well as for those who favor one. *See N.L.R.B.* v. *Savair Mfg. Co.*, 414 U.S. 270, 278, 94 S.Ct. 495.
>
> • • •
>
> I am not at all sure that this special new category will be identifiable by any standard other than probable opposition to the union at election time — which is obviously an impermissible standard under *Savair* . . .[4]

[4] The lack of neutrality of Petitioner's stance is in fact explicitly revealed at page 11 of the Petition:

> This "access" [to management] lessens the likelihood that they would vote in favor of union representation; since they have an effective avenue of access to management, their perceived need for a collective representation to provide such access is limited.

II.

THE QUESTION PRESENTED IS NOT ONE OF GENERAL IMPORTANCE.

The only cases which are worthy of Supreme Court review are cases which present issues of general importance. For example, Rule 17.1 of the Court's Rules provides that "[a] review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are *special and important* reasons therefor" (emphasis added). Similarly, Justice Harlan once remarked that "[t]he cornerstone of a petition for certiorari in a federal case is a showing that the question to be reviewed is one of *general* importance." *Manning The Dikes*, 13 Record N.Y.C.B.A. 541, 551 (1958).

Importance is an essential element for Supreme Court review even where there is, as in the instant case, a conflict among the circuits. For example, in *Almota Farmers Elevator & Whse. Co.* v. *United States*, 409 U.S. 470, 473, 93 S.Ct. 791, 794, 35 L.Ed.2d 1 (1973), the Court granted certiorari where a conflict in the circuits existed "to decide an *important* question of eminent domain law." (emphasis added) Similarly, in *Aldinger* v. *Howard*, 427 U.S. 1, 2-3, 96 S.Ct. 2413, 2415, 49 L.Ed.2d 276 (1976), the Court granted certiorari to resolve the conflict in the circuits on the following "important question":

> This case presents the "subtle and complex question with far-reaching implications," alluded to but not answered in *Moor* v. *County of Alameda*, 411 U.S. 693, 715, 93 S.Ct. 1785, 1799, 36 L.Ed.2d 596 (1973), and *Philbrook* v. *Glodgett*, 421 U.S. 707, 720, 95 S.Ct. 1893, 1901, 44 L.Ed.2d 525 (1975): whether the doctrine of pendent jurisdiction extends to confer jurisdiction over a party as to whom no independent basis of federal jurisdiction exists.

See also *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 638, 94 S.Ct. 791, 795, 39 L.Ed.2d 52 (1974) (conflict among circuits as to constitutionality of mandatory maternity leave rules).

The general importance of the question presented pales in comparison with the questions presented in the cases cited above. The issue in dispute herein is of significance only under circumstances which rarely occur. Specifically, the issue is of significance only where the vote of a close relative of the owners of a closely held corporation who does not enjoy a special status at the work place could determine the results of representation election among the corporation's employees. Undoubtedly, there are pressing issues of far greater importance which are more deserving of the Court's limited resources.

The unimportance of the question presented is reflected in the inconsistent treatment it has received by the Board. For example, as the Seventh Circuit revealed in *N.L.R.B.* v. *Caravelle Wood Products, Inc.*, 504 F.2d 1181, 1184-86 (1974) (*Caravelle II*), the Board has alternated over the years between excluding individuals merely on the basis of familial relationships and requiring the existence of job-related privileges and benefits. Compare also *Tops Clubs, Inc.*, 238 N.L.R.B. 928 (1978); *Modern Manufacturing Company, Inc.*, 261 N.L.R.B. 534, 551-52 (1982) and *Toyota Midtown, Inc.*, 233 N.L.R.B. 797 (1977) (special status standard applied) with *Dunn Bros., Inc.*, 235 N.L.R.B. 1032, 1043 (1978) and *Marvin Witherow Trucking*, 229 N.L.R.B. 412 (1977) (exclusions on the basis of familial relationships without regard to special job-related status). As the Seventh Circuit recognized in *Caravelle II*, *supra* at 1185, "the Board has used both standards with no discernible rationale for choosing one over the other." If the issue in

dispute were one of great importance the Board would have formulated a consistent standard or, at least, set forth reasons for choosing one standard over another.

III.

THE QUESTION PRESENTED IS NOT RIPE FOR REVIEW.

As revealed *supra*, the Board has at times utilized the "special status" standard followed by the Second, Sixth, Eighth and Tenth Circuits. At other times, the Board has allowed exclusion of relatives of owners solely on the basis of their familial relationship. The majority of the current Board was recently appointed by President Reagan. They have changed longstanding rules of the Board. See, e.g., *United Technologies*, 268 N.L.R.B. No. 83, 115 L.R.R.M. 1049 (1984) and *Milwaukee Spring Div. of Illinois Coil Spring*, 268 N.L.R.B. No. 87, 115 L.R.R.M. 1065 (1984). In view of the Supreme Court's recognition of the expertise of the Board in labor relations matters[5], it would be appropriate to defer review on the issue presented until the present Board has had the opportunity to consider the issue in dispute.[6] Such a deferral will not have a disquieting effect on national labor policy since, as revealed *supra*, the issue is not likely to recur with any frequency.

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[5] See *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 488, 71 S.Ct. 456, 465 (1951).

[6] Undoubtedly, the present Board will respect the Supreme Court's instructions to administer the Act in a manner which respects those who oppose a union as well as those who favor one and consequently, adhere to the "special status" standard as applied by the Sixth Circuit below. See *N.L.R.B.* v. *Savair*, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

KELLER, THOMA, SCHWARZE, SCHWARZE,
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Dated: April 20, 1984

JOINT

APPENDIX

Office - Supreme Court, U.S.
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CLERK

No. 83-1416

In the Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

ACTION AUTOMOTIVE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED FEBRUARY 24, 1984
CERTIORARI GRANTED MAY 14, 1984

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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Case No. 7-RC-16322
(UNIT B)

ACTION AUTOMOTIVE, INC., EMPLOYER

and

RETAIL STORE EMPLOYEES UNION, LOCAL 40,
UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, AFL-CIO-CLC, PETITIONER

TYPE OF ELECTION
(Check one)

- ☐ Consent Agreement
- ☒ Stipulation
- ☐ Board Direction
- ☐ RD Direction

(Also check box below where appropriate)

- ☐ 8(b) (7)

CERTIFICATION OF REPRESENTATIVE

An election having been conducted in the above matter under the supervision of the Regional Director of the National Labor Relations Board in accordance with the Rules and Regulations of the Board; and it appearing from the * Tally of Ballots that a collective bargaining representative has been selected; and no objections having been filed to the Tally of Ballots furnished to the parties,

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* Revised tally of ballots.

or to the conduct of the election, within the time provided therefor;

Pursuant to authority vested in the undersigned by the National Labor Relations Board, IT IS HEREBY CERTIFIED that a majority of the valid ballots have been cast for RETAIL STORE EMPLOYEES UNION, LOCAL 40, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO-CLC, and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all the employees in the unit set forth below, found to be appropriate for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

UNIT: All office clerical employees employed by the Employer at its G-4273 Corunna Road, Flint, Michigan, facility; but excluding all store and warehouse employees, store managers, assistant store managers, guards, supervisors as defined in the Act and all other employees.

Signed at Detroit, Michigan
On the 26th day of January 1982
[SEAL]

On behalf of

NATIONAL LABOR RELATIONS BOARD

Regional Director, Region Seven
National Labor Relations Board

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

Case No. 7-RC-16322

IN THE MATTER OF:

ACTION AUTOMOTIVE, INC., EMPLOYER

and

RETAIL STORE EMPLOYEES UNION, LOCAL 40,
UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, AFL-CIO-CLC, PETITIONER

Bankruptcy Courtroom
U.S. Court House
600 Church Street
Flint, Michigan

Monday,
July 6, 1981

The above-entitled matter came on for hearing pursuant to Notice at 10:00 a.m.

BEFORE: Harvey R. Dasho, Hearing Officer

APPEARANCES:

Appearing on behalf of the Employer:

Stewart J. Katz, Esq.
2900 City National Bank Building
Detroit, Michigan 48226

[2] *Appearing on behalf of the Petitioner*:

Mary Ellen Gurewitz, Esq.
1000 Farmer
Detroit, Michigan 48226

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[8] MARIANNE HILDERBRANT

was called as a witness by and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

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[9] DIRECT EXAMINATION

BY MS. GUREWITZ:

Q Ms. Hildebrant, where are you employed?
A Action Automotive in the main office.
Q What do you do there?
A I do data processing, billing.
Q How many days a week do you work?
A Usually five—well, actually it's five one week and six the next. I work every other Saturday.

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[11] Q Do you know John Sturgis?
A Yes, I do.
Q Do you know what his position is with Action Automotive?
A He's a warehouse salesman for JED Warehouse.
Q You said JED Warehouse. Do you know what JED Warehouse is?
A It's our warehouse that is behind the office where we [12] stock all of the items that we supply the store with.
Q How is that spelled?
A Pardon me?
Q How do you spell JED Warehouse?
A J-E-D.
Q Does Mr. Sturgis have a desk in the office, in the area with the other office clerical employees?
A He is in the office, but he is back with some other people that are back behind the reception area.

Q Can you explain what the layout is and where people are located?

A Most of the girls are located in the front of the building in the accounting office and then there is the reception area where you walk into the office. Laura is there and then off to the left is the data processing area and that includes myself and another girl, and then behind the reception area, they have several desks where John Sturgis and David Scigliano and Bob Huntley are located.

Q Do you know what David Scigliano's position is?

A I don't know what his title is.

MS. GUREWITZ: Could we stipulate regarding Mr. Scigliano's position?

MR. KATZ: We'll stipulate that he is a supervisor.

MS. GUREWITZ: Okay.

HEARING OFFICER: He is the supervisor of the office [13] clerical employees?

MR. KATZ: No, Larry Lochman is. He is operations manager, store operations manager.

HEARING OFFICER: Scigliano?

MR. KATZ: S-c-i-g-l-i-a n o.

HEARING OFFICER: Will the parties stipulate that Mr. Scigliano is the operations store manager, Ms. Gurewitz?

MS. GUREWITZ: Yes.

Q Do you know what Mr. Huntley does?

A Mr. Huntley, I believe, mostly handles public relations. He handles problems outside.

MR. KATZ: For purposes of maybe speeding this up, we would have no problem in stipulating that he too is management and a supervisor within the meaning of the Act, as is Larry Lochman who is the supervisor over the office and Bob Alm, A-l-m who I believe is data processing manager, and Dave Taulker, T-a-u-l-k-e-r, who is merchandising manager. There is also somebody who is an office manager and his name I don't know.

THE WITNESS: Barbara Arnold.

MR. KATZ: Barbara Arnold who also is a supervisor and Mr. Scigliano. We would even reluctantly agree that the three Sabo's are supervisors. I think that's an accurate accounting of the supervisory hierarchy not counting the store managers and the assistant store managers who are [14] supervisor and the warehouse manager and assistant warehouse manager, all of whom were ineligible to vote as supervision.

I think that is the supervisory hierarchy. We would be willing to stipulate to that.

HEARING OFFICER: Ms. Gurewitz?

MS. GUREWITZ: Yes, we would so stipulate.

HEARING OFFICER: Very well. I will note for clarity that the stipulation pertains to the various individuals named by Mr. Katz as being supervisory personnel of the employer.

MS. GUREWITZ: Mr. Katz mentioned the three Sabo's but I don't think we put on the record that Mr. Katz stated he would stipulate that this corporation is owned by Richard Sabo, Robert Sabo and James Sabo?

MR. KATZ: In one-third proportions.

MS. GUREWITZ: Each has one-third interest.

MR. KATZ: And I think reference was made in opening remarks but not put into stipulation form that Diane Sabo is the wife of Richard Sabo and Mildred Sabo is the mother of the three Sabo's.

HEARING OFFICER: Fine. Let's take them separately. Will the parties stipulate that the entire corporation herein, being Action Automotive, Inc. is owned jointly by Richard Sabo, James Sabo and Robert Sabo with each of the three brothers owning one-third of the corporation?

[15] MR. KATZ: Yes, we have no problem stipulating to that.

MS. GUREWITZ: Yes.

MR. KATZ: And also before you get on to the next stipulation, I would propose an interim stipulation in keeping the topic flowing, reference was made to JEL,

J-E-D. That is the warehouse operation which is a corporation also owned by the three Sabo's and with one-third interest. We have no problem stipulating to that.

MS. GUREWITZ. We so stipulate.

HEARING OFFICER: I'll receive the stipulation. Would you pose your stipulation with respect to the challenged voters, the two Sabo's?

MR. KATZ: I haven't taken a position. We don't deny that they are the wife and mother but as such, there is no special status given to them.

HEARING OFFICER: I understand that. Who is the mother and who is the wife?

MR. KATZ: We would propose the following stipulation, that Diane Sabo is the wife of Richard Sabo and that Mildred Sabo is the mother of Richard, Jim and Bob Sabo, who are one-third owners each.

MS. GUREWITZ: Mr. Katz also indicated that he would stipulate that Richard Sabo is the president of Action Automotive, Robert is Vice President and that James is secretary-treasurer.

[16] MR. KATZ: That is correct. Yes, we'll stipulate to that.

HEARING OFFICER: Very well, I'll receive both those stipulations.

Ms. Gurewitz, you are unable [sic] to stipulate with respect to the two challenged voters, Diane and Mildred? Their familial relationship?

MS. GUREWITZ: Yes.

HEARING OFFICER: Stipulate with Mr. Katz?

MS. GUREWITZ: Right.

HEARING OFFICER: All right, and also to the three titles which were indicated for the three respective brothers. I'll receive both those stipulations.

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[18] Q Do you know Diane Sabo?

A Yes, I do.

Q Okay.

MR. KATZ: I'm sorry, I missed that question.

Q Do you know Diane Sabo?

A Yes.

Q Have you observed her working at Action Atuomotive?

A Yes.

Q Is she working there now?

A Today you mean?

Q Yes.

A No.

Q Has she been working in the last month or two?

[19] A About the last three weeks, she has been off.

Q Prior to her going off ill, how many days a week did she work?

A Usually two. If we're in a bind, she comes in more often.

Q Do you know if she had a regular schedule?

A I don't know.

Q Did you ever hear her ask to leave early or did you ever observe her leave early?

A She has left early on occasion, yes.

Q Do you know for what reason?

A The times that she told me, it was usually her children. She had to go get the kids from school.

Q Have you observed other people leaving early?

A Yes.

Q For what reasons?

A Myself, I sometimes have to leave early because of my children. Other girls have left early for doctor's appointments.

Q Do you leave—when you leave early to take care of your children, do you do it often?

A No.

Q Do you have to ask permission to leave early?

A Usually we should let them know in advance.

Q How far in advance?

A Well, probably it would be best like the day before, but [20] I have left on occasion at the last minute.
Q Do you punch a timecard?
A Yes, I do.
Q On what basis are you paid?
A Hourly.
Q What benefits do you receive, if any?
A I receive a paid vacation, and we have—
Q How many weeks a year do you receive?
A One week. We also have a profit sharing plan. And two fifteen minute breaks, one in the morning and one in the afternoon.
Q Do you get a paid lunch hour?
A Pardon me?
Q Do you have a paid lunch hour?
A No, we punch out for lunch.
Q You don't punch out for breaks though?
A No.
Q Do you have hospitalization?
A It is available, however, I opted not to go for it. I receive other hospitalization insurance.
Q If you get—if you opt to have the plan, do you have to pay for it or is it paid by the employer?
A To my knowledge, it's paid by the employer.
Q Are there any other benefits—do you get paid when you are sick?
[21] A No.
Q You are not paid sick days?
A No. We do have a paid life insurance plan.
Q How much is that for?
A I believe it's $5,000.
Q Do you know if Diane Sabo regularly works the same days of the week?
A Yes, she usually did work Tuesdays and Thursdays.
Q Are there other part time employees?
A No, not now.
Q Have there been other part time employees?
A Yes.

Q Who is that?
A Sue Freeburg was a part time employee.
Q Is she no longer employed?
A Correct.
Q Since Ms. Freeburg left, have there been any part time employees besides Diane Sabo?
A No.
MS. GUREWITZ: I have nothing further.
HEARING OFFICER: Mr. Katz?

CROSS EXAMINATION

BY MR. KATZ:

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[27] Q Marianne, what is your job classification?
A Data processing.
Q Is that what you do full time?
A Correct.
Q So your knowledge of what other people do full time is limited by your working full time at your job, isn't that correct?
A As far as current, yes, but I have done a lot of other jobs.
Q Okay. You were asked about benefits, is it not—is there not an employee book that you sign for, a manual?
A Yes.
Q And isn't that given to all employees?
A Yes, to my knowledge, it's given to everybody.
Q And is it not a fact that the benefits that are in that apply to full time employees?
A Correct.
Q So that if someone were a part time employee like perhaps Sue Freeburg or Diane Sabo or anyone else in the stores, they would be covered by the same book as well, would they not?
A Correct.

Q Now, you indicated that there was—you did not receive pay when you were off sick?

[26] A Correct.

Q Is it not a fact that Diane Sabo does not also get paid when she is off, also does not get paid?

A I have no idea. I don't.

Q Okay. Now, you indicated Sue Freeburg was part time. She recently resigned, did she not?

A Correct.

Q That is not the only time we have had parttimers working in the office, is it?

A No.

Q Now, when you leave work early to pick up your children, who would you report that to? Would you report to Larry Lochman?

A Usually to Bob Alm.

Q Okay. Now, you would get permission to leave?

A Yes.

Q And to your knowledge, don't other employees report to somebody when they are leaving?

A Yes.

Q Is it not a fact that office employees have taken work home to do?

A Yes, that's correct.

Q And that when they do take work home, they are compensated for that?

A Yes.

[27] Q And that would be in addition to what work they would perform in the office?

A That's correct.

Q Is it not a fact that Diane Sabo also takes work home?

A Yes, I have seen her take work home.

Q So that in addition to the two days a week or the hours that she puts in during those two days or the additional hours needed during the week, she will also take work home?

A Yes, she has.

Q Let me give you some others and see if I can jar your memory with regard to other employees who have been given special permission—would be accurate to say that other office employees have, because of family constraints been—have asked for time and have left work early?

A Yes, I suppose there have but my own cases of course is what I would know about best.

Q Do you know whether or not Sue Freeburg had her schedule adjusted to allow her to work less hours because she became pregnant?

A Yes.

Q Do you know that Sheryl Colley had her work schedule adjusted to allow for her to contend with health problems of her child?

A Yes, correct.

Q And they were all granted, these adjustments?

[28] A Yes, they were.

Q Is it not a fact that an employee was allowed an extended vacation period to permit her to spend a summer vacation period with her family, namely Terri Luten?

A I have no knowledge of that.

Q She works in the store, does she not?

A Yes, she does.

Q It's not an unusual situation that special favors or accommodations are made for office employees?

A No, it's not unusual.

Q What time do you normally work in the morning?

A My scheduled time is 9:00.

Q And you don't know what time John Sturgis might come in?

A No, I have no idea.

Q All right. Marianne, I'm just curious, it's my understanding that the reason you were allowed to start at 9:00 rather than the way other people start is to accommodate babysitting problems that you have with your family?

A That's correct.
Q Do you remember an employee named Laura Freeburg?
A Yes, I do.
Q Did she do data processing work?
A Yes, she did. She trained me.
Q What?
A She trained me.
[29] Q She was a data processing clerk?
A Yes.
Q Was she not situated at the desk that John Sturgis is now situated at?
A Yes, that's correct.
MR. KATZ: I have nothing further.
HEARING OFFICER: I have just a couple of questions.

EXAMINATION

BY HEARING OFFICER:

Q Do you know what time the other office clerical employees start in the morning?
A 8:00 a.m.
Q And how long is their shift, what time do they get off?
A 5:00.
Q And your shift is from 9:00 until when?
A Until six.
Q And there has been testimony concerning—could you describe for me the office clerical duties, typing, billing, what duties are performed by the office clericals?
A All office clericals?
Q Right.
A I do billing and sometimes getting into receivables, and the girl that sits next to me, Joyce does billing also and she has been doing the five and ten percent cards that they mentioned earlier. Lori does reception work and the five [30] and ten percent cards. She has also helped me out in data processing since Debbie Crowley quit and put us in a bind.

Q Okay.
A Then there is the payroll clerk, Sandy Polman, I believe is her name. She is a new employee. Margaret Bailey does daily deposits from the stores to the banks and reconciles the deposit slips to the books. Nancy Fisher and Ines Hall both do payables for the Flint and Lansing areas. Claudette and I don't know her last name, does the daily sales that come in from the stores. All their work that they do, she balances those.
Q You mean she does the daily sales, she is not making the sales?
A No, she is balancing their sales as far as over and short.
Q Anymore clerical employees?
A No, just the office manager.
Q Who is the office manager?
A Barbara Arnold.
Q And the people you have just mentioned including yourself report to Barbara Arnold?
A No, I report to Bob Aim. And also Joyce will too.
Q And the remaining people report to whom?
A To Barbara Arnold.
Q Do you know who Mr. Sturgis reports to?
A No, I don't. As far as I know, Bob Sabo.
[31] Q But you are not certain?
A No.
Q Now, more specifically—you have given me what they handle. Now more specifically what duties are they doing? Are they typing, billing, filing, these types of duties?
A Yes, that would include all of that.
Q Any other duties that would not be covered by the terms such as typing, billing, filing?
A Balancing, that sort of thing.
Q Posting?
A Yes.
Q Okay.

A Also some of the girls from the back office do [] the processing out of the computer as far as payables are going on the computer now, so they are working on processing those and putting those in.

• • • •

[34] REDIRECT EXAMINATION

BY MS. GUREWITZ:

• • • •

[40] Q Now, you said that office employees take work home sometimes?

A Yes.

Q How do you know that?

A I've done it myself. I have work at home right now.

Q How often do you do that?

A Probably once a month.

Q And how many hours would you spend then working at home?

A Oh, I would say on an average of probably four or five hours during the weekend, if I took it home on Friday night.

Q Okay.

A It would depend on what kind of work it is.

[41] Q Then would it be four or five hours be the amount of work that you would do at home per month on the average?

A Yes, probably about that.

Q How do you know that Diane Sabo takes work home?

A I have seen her walk out the door with adding machines, ledger books.

Q How often have you seen that?

A Oh, quite often.

Q Can you estimate how often quite often is?

A Probably every third time that she is at work.

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[43] RECROSS EXAMINATION

BY MR. KATZ:

Q Diane Sabo, she does general ledger work, does she not?

A Yes, that's correct.

Q You do data processing work on a computer?

A Yes.

Q It's a little difficult to carry a computer home, is it not?

A Correct.

• • • •

[49] RICHARD SABO

having been called by the Petitioner, was first duly sworn, and was examined and testified as follows:

DIRECT EXAMINATION

BY MS. GUREWITZ:

Q Mr. Sabo, by whom are you employed?

A Action Automotive.

Q What is your position?

A President.

Q Diane Sabo is your wife?

A That's correct.

Q Does she live with you?

A Yes.

Q Mildred Sabo is your mother?

A Yes.

Q She lives with your brother James Sabo, does she not?

A Yes.

Q How long has Action Automotive been in existence?

A Approximately five years under that trade name.

[50] Q Was the business in existence prior to that time under another name?

A Another business of the same sort was in existence under another name.
Q What name was that?
A Acme Auto Stores.
Q Who founded Acme Auto Stores?
A I'm not sure.
Q Did your father have any interest in that business?
A No, my father worked for General Motors.
Q Diane Sabo receives a salary, does she not?
A Yes.
Q Her salary is $100 a week?
A Per week, yes.
Q Regardless of how many hours she works?
A No. That's not true.
Q Does her salary vary?
A Her salary is the same, however if she doesn't work, she doesn't get paid.
Q But if she works 16 hours one week and 20 hours the next, she still gets $100?
A The average of her work week is 20 to 25 hours and if it's that, she does get paid, yes.
Q What if she worked less than 20, does she still get paid?
A She generally makes the time up and she does get paid.
[51] Q Does she punch a timecard?
A No.
Q Is her time written in on a timecard?
A Her time is recorded on a timecard and verified by her supervisor.
Q Who is her supervisor?
A Larry Lochman.
Q Who records her time on a timecard?
A She does.
Q Why does she not punch a timecard?
A It's a carry over from our previous business. She has been employed approximately 11 years. We didn't used to have timeclocks.

Q But when you got timeclocks, you did not have her start punching a timecard?
A That's correct.
Q What other employees do not punch a timecard?
A John Sturgis.
Q Do the supervisory employees in the office punch a timecard?
A No. Although at the stores they do.
Q Aside from supervisors, Mr. Sturgis and Diane Sabo, they are the only people in the office who don't punch a timecard?
A I'm not sure. I would have to think about that.
Q You said the supervisors in the store do punch a timecard?
A Generally, yes, they do.
[52] Q Does Mildred Sabo punch a timecard?
A I don't believe so.
Q She writes her time in on her card, doesn't she?
A Yes.
Q Are there any other store employees that you know of who write their times in rather than punching them in?
A I'm trying to think. As I said before, if I think of one, I'll let you know.
Q You can't think of any at the present time?
A At the present time, I cannot.
Q Why does Mildred Sabo write her time in rather than punch it?
A Once again, a carry over from the previous business. She has been employed about 11 years.
Q Are there any other employees who were also employed at the previous business?
A Fred Britton.
Q Does he punch a timecard?
A He may or may not. Depending on where he is at. He may not be near a timeclock, so he could be perhaps one that would not punch a timeclock.

Q Are there any other employees that worked in your previous business?

A Pardon?

Q Are there any other employees that worked in your [53] previous business?

A I think there probably are.

Q Do you know if they punch timecards?

A They probably do.

Q You said Mr. Sturgis does not punch a timecard. How is Mr. Sturgis paid?

A He is paid on a salary plus a sales commission.

Q His salary is $300 a week?

A That's correct.

Q And what is his commission?

A It's a variable commission similar to the stores. It's a one percent, two percent escalated situation based upon the sales he writes.

Q Do you know about how much a week that would amount to?

A In commission?

Q Yes.

A $50 perhaps.

Q Does that commision check come separately from his salary?

A No. He is paid a commision on his paycheck like anybody else would be.

Q He just gets one paycheck?

A He gets one paycheck that has his base salary plus his commision.

Q What is Mr. Sturgis' title?

[54] A He's a sales person, sales rep.

Q Is there any other person with that title?

A Not at the present time.

Q If Mr. Sturgis is ill, is his salary reduced for that week?

A Yes.

Q Does he receive a paid vacation?

A Yes, he does, per the employee manual.

Q Do all employees get paid hospitalization?

A Once they qualify, yes.

Q How do they qualify?

A By serving a tenure period of 90 days.

Q Is it paid for the employee and his or her family?

A It depends on the individual.

Q For the sales employees, are their families covered or is it only the employees themselves?

A Quite frankly, our policy is very loose on that. It's a mixed situation.

Q Some employees get coverage for themselves and their families and some employees just get for themselves?

A Yes. It depends upon the need.

Q Okay.

A As Marianne indicated, she gets hers elsewhere.

Q How about Mr. Sturgis, is his family covered?

A I'm not sure.

• • • •

[55] Q Diane Sabo's time varies from week to week. The time that she records on the timecard, isn't that true?

A I would say there is some variance, yes.

[56] Q And you said she is expected to make up if she works less?

A Generally she takes work home to make up, yes.

Q How many hours a week is she expected to work?

A She works 20 to 25 hours a week.

Q Whether she works 20 or 25, she still gets paid $100 a week?

A Yes.

Q What accounts for the fact that some weeks she works more than other weeks at the store or at the office?

A It's principally on a need situation. She does general ledger work which most of the other girls do not as Mr. Lochman directs her. She generally works and sometimes the work builds up.

Q Is there a dress code for employees in the stores?
A In the stores, they wear a company vest. Retail clerks, that is.
Q Is there one classification of clerk and one of cashier or is that the same classification?
A They are different classifications; however, there is some spill over both directions, for both employees.
Q Some stores are quite small, isn't that true?
A Yes.
Q And there are stores where there would be only one cashier working and no clerks?
A I don't think so.
[57] Q For example, let's direct your attention to Store No. 6 where Mildred Sabo works. Who is the manager of that store?
A At the present time, Cecil Brewer.
Q Who was the manager of the store in early 1981?
A Charlie Douglas.
Q Who else works at that store besides—in the sales part of the store besides Mr. Douglas?
A The store has a manager and assistant manager, and has a service manager and assistant service manager.
Q Does that store have a gas station facility as well?
A It has a gas station facility as well.
Q As well as auto parts sales?
A As well as a service center, yes.
Q Who works in the service center?
A The service center has a service manager, an assistant service manager.
Q I'm sorry.
A It's one and the same building.
Q The service [c]enter and the gas station?
A No, dear. The service center and the store are the same. The gas station is separate.

• • • •

[58] Q There is a service manager in addition to the store manager?
A Yes.

Q And how many—are there clerks and cashiers both in the stores?
A Yes.
Q Who are the clerks?
A By name?
Q Yes.
A At the present time today?
Q Yes, do you know?
A A gentleman by the name of Ron Payne, Bruce Hillaker, Alan Williams, I think there is one other. There are three or four in sales.
Q How many cashiers are there?
A Two or three. It varies.
Q Would there generally only be one cashier working at a time?
A Yes.
Q Are the cashiers expected to do sales work?
A Yes and no. In that store, in fact, that is our biggest store which employ[]s the biggest amount of people.
So the cashier in there is a different type of function than at the other locations.
[59] Q You said the other cashiers wear company vests?
A The vest is a brand of uniform. However, prior to the vest, we had no dress code for the cashiers. We had a smock that we asked that they wear but it was a loose procedure and wasn't upheld very well.
Q How long have they been wearing the vests?
A I think about two months.
Q Is there any rule with regard to whether they wear dresses or slacks, the women?
A Not that I'm aware of.
Q What is the maximum salary of an office non supervisory employee?
A The maximum salary for an office non supervisory employee?
Q Well, first aside from Mr. Sturgis and the supervisors, are all of the pepole in the office paid hourly?

A Yes.

Q Do you know what the highest hourly salary is for an office employee, highest hourly rate?

A I think it was Sue Freeburg at $5.90.

Q And who would be the next?

A I would have to think but probably at the $5 an hour, we had several clerks at $5 an hour.

Q What is the average salary in the sales function, what is the average salary of a cashier?

A $3.75 to $4.25.

[60] Q What would—would $4.25 be the highest?

A I would say it would be near the highest. We don't have any hard and fast rule. It's principally based upon merit performance, et cetera.

Q Mildred Sabo makes $4.50 an hour, isn't that true?

A That's correct.

Q So would she be the highest paid of the cashiers?

A I think she is near the top, yes.

Q Can you think of any cashier that makes $4.50 an hour besides Mildred Sabo?

A We have 150 employees. I don't have all that information in my head. We have people that make more money than that. And people that make less money than that.

Q Do you have any cashiers that make more money?

A I don't know.

Q But you said generally cashiers make $3.75 to $4.25?

A What I said is generally. It's based upon the person's expertise and skill and how well they do their job.

Q Okay.

MS. GUREWITZ: I don't have anything further.

HEARING OFFICER: Mr. Katz?

CROSS EXAMINATION

BY MR. KATZ:

Q Let me work a little backwards. Mildred Sabo is at $4.50 an hour?

[61] A Yes.

Q She is hourly rated?

A Yes.

Q How many years has she worked for the company?

A I think it's been 11 years.

Q Can you think of any other cashier or sales clerk in the stores off the top of your head that have been with us more than two or three years?

A No.

Q There are office employees, non supervisory who earn more than Mildred Sabo?

A Yes. Several.

Q Let me direct your attention to the end of May, were the vests in the stores at that point?

A Yes.

Q Were they in formally, the employees wore them?

A Yes.

Q Did your mother wear that uniform, to your knowledge?

A Yes.

Q There has been some testimony as to the hours your wife, Diane, may work in the schedule of the store. Who determines her schedule?

A Larry Lochman does.

Q Do you in any manner instruct Mr. Lochman how to schedule your wife?

[62] A Absolutely not.

Q Has Mr. Lochman ever been given any instruction by you to treat your wife differently than any other office employee?

A No.

Q Were you in the room before when there was some discussion about accommodations being made to several employees' scheduled hours?

A Yes.

Q Do you have any recollection of an employee named Terry Luinn?

A Yes.

Q Was any accommodation made for her?

A I think last summer we gave her approximately eight weeks off to be with her family and her husband.

Q That was in addition to the—

A She was scheduled for a vacation and this was in addition to that.

Q But that was in addition to any examples given by the prior witness?

A Yes.

Q Now, if your wife misses time and is off, does she get paid?

A No.

Q Are other employees able to make up time?

A Yes.

[63] Q You were asked some questions about benefits. There was some testimony by the prior witness about an employee manual that is signed for and given to each employee.

A Yes.

Q Are the benefits common for all employees?

A Yes.

Q Is that true whether they work in the store or the office?

A Yes.

Q Is there a distinction drawn between full time and part time in terms of benefits?

A Yes, some.

Q Does your wife as a part time employee get any benefits that any other employee doesn't get?

A No.

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[65] Q Does your mother get commission in the store?

A Yes.

Q Is that any different than the commission we have talked about up to now?

A No, it's the same.

Q So she gets it?

A Yes.

Q Does Mr. Britton get a commission?

A No.

Q The commission your mother gets, is it identical [to] that what any other cashiers or salesclerk gets?

A Yes.

Q Or assistant store manager?

A Yes.

Q I'm not sure if I asked you this question, who supervises your wife?

A Larry Lochman does.

Q What type of work does she perform again?

A She basically performs general ledger work.

Q Is it somewhat different than what other employees do?

A Well, it's a more skilled situation. All accounting flows into the general ledger, accounts payables, receivables, [66] et cetera. The general ledger is the book that produces the financial statement.

Q So that if she works between 20 and 25 hours in essence, she is being paid between $4 and $5 an hour?

A Yes, I would say more like $4 to $4.25, $4.50.

Q When she writes in her own time, is there somebody responsible to verify that time that is recorded?

A Yes, Larry Lochman does.

Q And that is verification of the time actually spent in the office area?

A That's correct.

Q Is Mr. Lochman in the office virtually 100 percent of the time?

A Absolutely.

Q When she is in the office, where is she situated?

A She is an accounting clerk. The office is divided into roughly three areas and the accounting department is where she works.

Q Is she right in with the other office people who voted?

A Right, in with all the girls, yes.

Q Mr. Sturgis' salary, now he works Saturday, does he not?

A Yes.

Q Is he paid anything extra for that?
A No. He works more hours than the average person does.
Q If you know, let me ask, Mildred Sabo, is she in fact living [67] with Jim Sabo?
A Yes.
Q Does she live for free?
A I don't think so.
Q Do you know what the arrangements are?
A I'm not sure of the arrangements, but I'm sure she pays.
Q Well, if you don't know, I'll forget it.
A Okay.
Q As I understand it, in the several years that you had the operation prior to Action Automotive that Mildred and Diane Sabo did not punch a timecard, is that correct?
A Yes.
Q This is merely a carry over from that tradition?
A Yes.
Q Off the top of your head, can you give me any employee of a non-supervisory nature who was employed by the prior company five or six years ago?
A As I said, Fred was.
Q Other than that, can you think of anyone else?
A Non supervisory?
Q Yes.
A Not at this point I can't think of anybody. There may be, but I don't know.
MR. KATZ: I have nothing further on cross.
HEARING OFFICER: I have a few questions.

[68] EXAMINATION

BY HEARING OFFICER:

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[75] Q With respect to your corporation, there was an earlier stipulation that you and your two brothers collectively own 100 percent of the corporation?

A Yes.
Q Each one third?
A Yes.
Q Each own one third. So who would determine and here I'm talking about labor relations policies, i.e., wage rates, who would determine overall wage rates. Would that be yourself and your brothers?
A I would say that would be a collective decision, yes.
Q The three of you?
A Probably, yes. It depends on the severity of it, or the magnitude.
Q I'm not talking about somebody receiving a ten cent raise. I'm talking about the minimum policy?
A Generally the policies are a meeting type decision situation.
Q Do you and your brothers have regularly scheduled meetings amongst yourselves, the three of you?
[76] A We do meet, yes.
Q How often would that occur?
A As needed.
Q And you would discuss wage rates and determine them?
A Yes.
Q What about the employee benefit package, would that be something you yourself and your brothers would put together?
A Yes.
Q What about work rules?
A Generally, yes.
Q Now, in terms of matters such as hiring, firing, laying off, disciplining, I would assume the store managers would handle these matters?
A The supervisors. Once the rules have been established, the supervisors generally would carry them out.
Q This employee benefit package, does this cover just benefits or does this also cover work rules or policies?
A We have two books. One is an operations manual

that covers operations and specifically the various types of jobs and functions, and then we have an information manual that is a fringe benefit book.

Q So that would set forth the fringe benefits?

A Yes, it's an employee information manual.

Q Okay.

A And an employee operations manual itself. Two different [77] books.

Q Now, the operations manual would contain job descriptions?

A It has some job descriptions, yes. It's not inclusive.

Q Who would have formulated that manual?

A We would have done that.

Q Yourself and your two brothers?

A Yes.

Q Does that also set forth work rules and disciplinary procedures?

A I think so, yes.

Q And it would be your testimony that your store managers would utilize that manual to handle matters such as hiring and firing, et cetera?

A Yes.

Q Now, apart from Mr. Sturgis, do you directly supervise any employees?

A I think I directly supervise the office.

Q You are saying the office manager would report to you?

A Larry reports to me. Larry Lochman who is the controller.

Q You are his supervisor?

A Yes.

Q How about with respect to your brothers, do they directly supervise any employees?

A I would say we are a rather small company. I suppose we [78] all supervise all the departments. It's not quite that cut and dry.

Q Now, you are involved on a full time basis in the operations of the business, is that correct?

A Yes.

Q How many hours a week would you put in running the business?

A Too many. 80.

Q All right, and your brothers, what would—would your brothers also be involved on a full time basis?

A Yes, approximately the same hours.

Q They would be involved in the operation of the business and formulation of policies?

A Yes.

HEARING OFFICER: I've nothing further. Mr. Katz?

MR. KATZ: I have nothing.

HEARING OFFICER: Ms. Gurewitz?

MS. GUREWITZ: I have a few.

REDIRECT EXAMINATION

BY MS. GUREWITZ:

Q You said that you are Mr. Lochman's direct supervisor?

A Yes.

Q To your knowledge, has Mildred Sabo ever received any kind of disciplinary warning?

A I think she has, yes.

[79] Q Written warnings?

A I think so.

Q Do you recall when?

A Specifically, no, but I think she has been disciplined.

Q Do you recall, are there any records kept of those warnings?

A Yes, they would be in the main office.

Q Do you recall who would have issued those warnings?

A It would be her direct supervisor, the store manager, no doubt.

Q Do store managers ever discuss that with you?

A No, not directly.

Q What do you mean not directly?

A It might be brought up from time to time in conversation. Any employee may be brought up from time to time.

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[80] MS. GUREWITZ: I have nothing further.

HEARING OFFICER: I have one last question for purposes of my information, a bit late in the game, but could you just describe very briefly the overall nature of your business?

THE WITNESS: We are in the automotive aftermarket. We have a series of retail auto parts stores and at the stores, we sell auto parts, some locations sell gasoline. We have one location, in fact, the one in question, our South Saginaw unit, is the largest unit we have and that is a five bay service [81] center, a large store and a gasoline outlet.

HEARING OFFICER: You also have commercial accounts as well?

THE WITNESS: Yes.

HEARING OFFICER: Besides the general public?

THE WITNESS: Yes, that's our retail business, Action Auto, and then we function as a warehouse entity under JED, J-E-D, whereby we service our stores with automotive parts and supplies. We also have some outside business.

HEARING OFFICER: And JED as previously described, encompasses the employees in the stores and warehouse unit?

THE WITNESS: Yes.

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[86] VALERIE SNYDER

was called as a witness by and on behalf of the Petitioner, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. GUREWITZ:

Q Ms. Snyder, where are you employed?

A Action Automotive, on Dort Highway.

Q How long have you worked at the Dort Highway store?

A Two weeks this Friday.

Q Where did you work prior to that time?

A Flushing Road.

Q And have you ever worked at the South Saginaw store?

A Yes, I have.

Q When did you work there?

A I started in September of '77 until about a week before the election, before I went to Flushing road.

Q Pardon?

A Before I went to Flushing Road, a week before the election.

Q And you were working at the South Saginaw store?

[87] A Correct.

Q Is this the store at which Mildred Sabo also works?

A Yes, it is.

Q What is your position?

A Cashier.

Q As a cashier, what job duties are you expected to perform?

A Straightening shelves, dusting, stocking, checking in orders.

Q And you also run the cash register?

A Correct.

Q Do you make any deposits yourself or prepare deposit bags with the money from your till?

A Well, it changes. Before, at the South Saginaw store, the store manager used to make them and then whenever the guy—we got a new manager and we make them ourselves.

Q You made deposits or you prepared bags?
A Made deposits.
Q And would you yourself go to the bank?
A No.
Q What kind of a deposit would you make?
A Out of the cash register, you are supposed to do a deposit every two hours and you write up a deposit slip, put the money in an envelope and hand it to the manager.
Q Is that what you call making a deposit?
[88] A Yes.
Q Is there always a manager on duty while you are there?
A Manager or assistant manager.
Q Is there a rule about how much money you should have in your drawer?
A Yes, there is.
Q What is that rule?
A You are supposed to make a deposit every two hours or whenever too much money accumulates in cash.
Q How much money is too much money? Have you been told?
A Anywhere—you shouldn't have no more than about $150 to $200.
Q Do you wear a uniform?
A Yes, I do.
Q What is that?
A A vest with slacks.
Q How long have you been expected to wear the vest?
A Like Mr. Sabo said, about two months.
Q What did you wear before that time?
A Off and on a smock.
Q Did you observe whether or not Mildred Sabo wore a vest?
A No, she did not.
Q Were you told whether you should wear a dress or slacks?
A In the recent operation manual, it says a cashier is to wear slacks, not dresses.

[89] Q What did you observe Mrs. Sabo wearing?
A Skirt, dress.
Q Would you and Mildred Sabo usually work at the same time?
A No, the shift changes.
Q How many cashiers were usually on duty at one time?
A One.
Q Did you work mornings or evenings?
A Evenings.
Q So when did Mrs. Sabo work?
A Mornings.
Q Did Mrs. Sabo stock shelves?
A Not to my recollection, no.
Q How would you know that she wasn't stocking shelves?
A I would have to come in and do it myself or someone else from the previous morning shift would tell me.
Q How about dusting the shelves and straightening the shelves, do you know if Mrs. Sabo did that work?
A No, I do not. I don't know if she did.
Q What was that?
A No, I don't know if she did.
Q Did you ever see her dusting the shelves or straightening them?
A No.
Q Were they dusted and straightened when you came in to work?
A Yes.
[90] Q Did you ever ask to leave before the end of your shift?
MR. KATZ: I'm sorry, I missed the question.
Q Did you ever ask to leave before the end of your shift?
A No.
Q Did you ever ask for a day off?
A Yes.
Q Were you given permission to take the time?
A Sometimes and sometimes no.

Q Who was your manager at the South Saginaw store?

A At what time?

Q Who was the manager—when was Charley Douglas the manager?

A I think he started at the beginning of January.

Q What year?

A '81.

Q Do you recall an occasion when Mildred Sabo—when you came in to work and Mildred Sabo told you that she was going to continue to work?

A Yes.

Q When was that? Do you recall?

A Off hand, no, I don't.

Q Was it in 1981?

A Yes, it was.

Q What happened out there at that time?

A I came in to report to work at 2:00. I called Dave [91] Scigliano previously and asked him if I could talk to him, that I was coming in at 2:00 and I would like to talk to him.

I went in to work and he was not there, so I went up to the cashier's to take over and Mrs. Sabo said that she was supposed to be working till three, and I said the schedule says two, and she went over to the schedule on the clipboard, took the schedule off the clipboard and went in the back room and talked to Charlie Douglas and came back up front and told me that she was staying till three.

Q Did you discuss that with Charley Douglas?

A No, I didn't.

Q At any time did you discuss that with him?

A He just said—he come up to me and said that he didn't have really no say so over whether she wanted to stay or not. He just let her stay.

Q When did he say that to you?

A After she left.

Q Did you use the same cash drawer as Mrs. Sabo?

A When I worked at shift changes, the morning cashier was supposed to do a box check. The drawer was supposed to be down to $50.

Q You say the cashier was supposed to do a box check?

A Yes.

Q What does that mean?

A She is supposed to do a box check to show how much she [92] was over or short for her period of time.

Q And the drawer was supposed to be down to $50 you say?

A Yes.

Q What does that mean?

A All the money was supposed to be taken out and make two deposits down to $50. And that is what I started with on my shift.

Q Would Mrs. Sabo generally have her drawer down to $50 when you came in?

A No. She didn't even do her box check. I had to do them.

Q Were there occasions when you found a substantial amount of money in the drawer?

A Yes, there was.

Q Did that happen often?

A Yes, it seemed like it did, yes. I had to come in and make two deposits out of one.

Q What do you mean by that, two out of one?

A Well, there would be so much money that you wouldn't put it in just one deposit. For instance, if it was $1,200, I would divide it into two.

Q Did you discuss that with anyone?

A Jim Bradley.

Q Who is that?

A He was the assistant manager, on South Saginaw.

Q What did you say to him?

[93] A I told him that deposits were supposed to be made before I came in and then I called Bob up and I told Bob Huntley because Jim Bradley didn't do anything

about it. He just told me to go ahead and make two deposits.

Q And who did you call after that?

A Bob Huntley.

Q What is his position?

A Educational training, I guess.

Q Why did you tell Mr. Huntley?

A There was no one else around to tell. I had to tell somebody.

Q What did you tell him?

A What did I tell him?

Q Yes.

A When I came in during my shift, there was $1,200 in the cash register.

Q Did he tell you he would take care of the problem?

A Yes, he did.

Q After that when you came in, would the register be down to $50.00?

A No.

Q Are the cashiers expected to do sales work?

A If they are not busy, if the parts people need help.

Q Are you permitted to use the phone while you are working?

A Yes, we are.

[94] Q For personal phone calls?

A Yes.

Q Can you have long conversations?

A No, we cannot.

Q Have you ever been told anything about using the phone or about your phone conversations?

A Twice.

Q What have you been told?

A Not to stay on the phone too long and not to be using the phone.

Q By whom?

A Charlie Douglas and Bob Sabo.

Q Were you permitted to take breaks during the day?

A No.

Q To your knowledge, is Mildred Sabo permitted to take breaks.

A I don't know.

Q Okay.

MS. GUREWITZ: I have nothing further.

CROSS EXAMINATION

BY MR. KATZ:

Q Val, as a matter of fact, other than this time when you came in at 2:00, you and Mrs. Sabo worked different schedules, is that correct?

A Right.

[95] Q You worked nights and she worked days?

A Correct.

Q Now, with regard to staying on the phone, you verbally were told that?

A Yes.

Q Did you get any written warning for that?

A No.

Q Do you know whether or not Mrs. Sabo ever received a written warning for staying on the phone?

A No, I do not.

Q But employees are permitted to use the phones?

A Yes.

Q South Saginaw is the biggest store in the chain, is it not?

A Yes.

Q And it has the most sales clerks?

A Same amount as in the other stores.

You got three parts people and you got three parts people in the other stores.

Q What time do you normally come to work? At that time?

A Over at that store, around 3 to 9.

Q 3:00, right?

A Right.

Q Not 2:00?

A Not unless I'm scheduled for it, no.

[96] Q This was a special deal on this one occasion you were talking about, coming in at 2:00?
A Special deal?
Q Did you want to work the extra hour, is that why you came in at 2:00?
A No.
Q You reported at 2:00 as scheduled?
A Yes.
Q Other than that, you came in at 3?
A Right.
Q You said before there were visits, but you used to off and on wear a smock?
A That's correct.
Q It was pretty loose as to whether you were a smock or not?
A Correct.
Q Were you ever disciplined for not wearing a smock?
A Yes.
Q You were disciplined for that?
A Wrote up you mean?
Q You either were a smock or didn't wear a smock, is that correct?
A On and off I did.
Q When you asked for the day off, who did you ask?
A The manager.
[97] Q He either granted it or he didn't grant it, correct?
A Correct.
Q It was his decision?
A Correct.
Q Are you a full time employee?
A Yes, I am.
Q As I understand it, you have a shift schedule that is put up a week in advance?
A Yes. It's made on a Wednesday and put up on Thursday.
Q But it's made up in advance?
A Yes.

Q As I recall, in looking at yours, there were times when you worked 37 hours, other times, 40, 45?
A Correct.
Q And that's determined by the store manager?
A Right.
Q But whether you worked 35 or 37 or 40, you are considered full time?
A Yes.
MR. KATZ: Nothing further on cross.
HEARING OFFICER: Ms. Gurewitz?

REDIRECT EXAMINATION

BY MS. GUREWITZ:

Q Were you ever disciplined for not wearing a smock?
A I was just told verbally.
[98] Q By whom?
A Dave Scigliano.
Q What did he tell you?
A To go back and get my smock and put it on.
Q Did the time of the shift change vary, did you have some days that you started at 2 and some days at 3?
A Yes.
Q Is that often that it varied?
A No.
Q How often do you think you would be scheduled to start at 2:00 rather than 3?
A I think I was scheduled at 2:00 that time because they needed help. I had a straight schedule, usually all the time. If I came in an hour[] early, it was because they needed the help.
MS. GUREWITZ: Nothing further.
MR. KATZ: I have nothing further.
HEARING OFFICER: Very well, you're excused.

(Witness excused.)

HEARING OFFICER: Ms. Gurewitz, anything further?
MS. GUREWITZ: Yes, Linda Payne.

LINDA PAYNE

was called as a witness by and on behalf of the Petitioner, and having been first duly sworn, was examined and testified as follows:

[99] DIRECT EXAMINATION

BY MS. GUREWITZ:

Q Ms. Payne, where are you employed?
A Action Automotive, Corunna Road.
Q What is your position there?
A Cashier.
Q Have you held other positions with Action Automotive?
A Yes, I have.
Q What other positions?
A I was promoted to a merchandising coordinator.
Q When did you start working for Action?
A October 19th of '79. I think that was the date.
Q When were you promoted to merchandising coordinator?
A December 5th of '80.
Q And what did that position entail? What did you do in that job?
A Displayed merchandise, organized the stores, the shelves.
Q Which stores did you go to?
A All of them including Lansing.
Q How often would you go to each store?
A Every week, twice a week sometimes.
Q And how many hours would you spend in each store?
A Two to three hours, sometimes longer.
Q Would you also go to the South Saginaw store regularly?
A Yes, I did.
[100] Q When you went to the South Saginaw store, did you have an opportunity to observe Mildred Sabo working?
A Yes, I did.

Q Did Mrs. Sabo wear a smock or a vest?
A No, she didn't.
Q Do you recall when the vests were furnished by the employer?
A It was during the wintertime, I would say near February.
Q As a cashier, were you told whether you could wear a skirt or dresses?
A Yes, I was.
Q Who did you discuss this with?
A Two different occasions. When I was hired in, Bob Huntley told me that they asked the women to wear slacks because of the male customers, and also a brassiere and that the men should wear ties.
They really did.
Q Did you notice whether Mrs. Sabo wore slacks?
A She did wear slacks, but she also wore skirts.
Q Did you see any other female cashiers wearing skirts?
A No.
Q Do you know what the duties of the cashier are besides running the cash register?
A Well, yes, you sweep floors, dust shelves, stock shelves, put away orders that come in every day, make deposits, sometimes help at the parts counter and in the books if they are really [101] busy, take care of customers on the floor.
Q Did you see most cashiers doing—
MR. KATZ: Objection, leading.
HEARING OFFICER: Sustained.
Q Did you ever see Mrs. Sabo sweep floors?
MR. KATZ: Objection, leading.
MS. GUREWITZ: That's not leading.
HEARING OFFICER: I don't think it's leading.
A No, I never did.
Q Did you ever see her dusting shelves?
A No.

Q Did you ever see Mildred Sabo putting up stock?
A No.
Q Putting away orders?
A No.
Q Did you see Mildred Sabo helping customers on the floor?
A Most of the time she stood behind the register and pointed at the parts counter and told them to go over there that one of the parts men would help them out.
Q What did you observe Mrs. Sabo doing while she was working at the cash register?
A Mostly all she did was stand behind the register and when a customer came, she would ring up their order, or when there wasn't a customer, she would talk on the phone to somebody, be painting her fingernails, reading a magazine.
[102] Q Were you permitted to read magazines when you were working as a cashier?
A No, I wasn't even permitted to read the ops manual. I was told to take it home and read it on my own time.
Q Have you ever observed other cashiers reading magazines or doing their nails while they were working?
A No.
Q Do you know Dave Taulker?
A Yes, I do.
Q Do you know how to spell his name?
A T-a-u-l-k-e-r.
Q What is his position?
A Merch»ndising manager.
Q Did you have any conversation—do you know what other positions Dave Taulker has held with Action Automotive?
A Manager of South Saginaw.
Q Did you have any conversations with Mr. Taulker about Mildred Sabo?
A. Yes.
Q Can you recall what those conversations were?
A Well, we mostly talked about manager and cashier

relationships and how you relied on your cashier and such and I recall one time we were talking about Mildred and how he had made a comment that she wasn't dependable in coming in at exactly 9:00, like she would appear 20 minutes after or [103] some time like that. I took it it bothered him the way he had spoken up about it.
Q Did you ever hear Mr. Taulker talk to Dave Scigliano about Bill VanCaren?
A Yes, I have.
Q Who is Bill VanCaren?
A He was the manager of South Saginaw and he quit and then he became the manager of our service center in Lansing.
Q What did you hear Mr. Taulker say to Mr. Scigliano about Bill VanCaren?
A That Bill had called him on several occasions and wanted to meet with him because he had something to talk about. I guess David Taulker said to David Scigliano that there was a lot of pressure in the store and that he was getting a lot of feedback about being fired and he didn't—

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[104] Q Did Mr. Taulker mention Mildred Sabo?
A Yes [M]ildred and Jim.
Q Pardon?
A Mildred and Jim Sabo.
Q What did he say about Mildred Sabo?
With regard to Mr. VanCaren, that evidently Mildred was giving pressures, more or less of a threat as to firing Mr. VanCaren.
HEARING OFFICER: Can you be a little bit more clear? What do you mean by evidently? What did he say?
THE WITNESS: I don't know exactly how he quoted it, but I was eavesdropping on the conversation and I'm trying to think exactly how he said it.

He said that Bill had said there was pressures at the store that he couldn't handle and they were coming from Mrs. Sabo, that there had been threats that she was going to have him fired.

HEARING OFFICER: Okay.

Q Are there periodic sales meetings?

A Yes, there is.

Q How often are those held?

A Supposed to be the second Wednesday of every month.

[105] Q Are you required to go?

A Yes. Everyone is.

Q Does that include office employees as well as sales employees?

A They never had before until just recently, the past few meetings and then they break in an hour. The meetings go for two hours long. They break in an hour and the girls will come in from the office and listen to one hour of it.

Q Have you seen Mildred Sabo at the sales meetings?

A Some of them.

Q Have you seen her at all of them?

A Not at all of them.

Q Have all employees been at all of them?

A No.

Q Have you ever been disciplined for not going to the meetings?

A Almost one time.

Q When was that?

A July of last year, I had missed it because I had a softball game. My manager said it was all right. Dave Seigliano had told him to write me up and Dan wouldn't write me up, Dan Freeburg, my manager. Dan then in turn told David to write me up and he said he would and he went back in the office and slammed the door and never came out with a written warning.

[106] Q Have you worked in the office?

A Yes, I have.

Q When?

A Between December and the 1st of April.

Q Is that while you were a merchandise coordinator?

A Pardon me?

Q Was that while you were the merchandising coordinator?

A Yes.

Q You had spent some time in the office?

A Yes.

Q How many hours a week would you spend in the office?

A When I first hired or when I was first promoted, not many, but within the last month, I had supposedly had another promotion to be Bob Sabo's assistant. I was told that by Bob Sabo, and by the warehouse manager, Greg Tankersley, so the last month or month and a half I was in there every day.

Q You said the last month or month and a half, before when? You mean the last month you were working in the office?

A Right, it was the whole month of March I would say.

Q Where are you working now?

A Coronna Road.

Q When did you start working there?

A I would say around the 1st of April. That's when I was demoted back to cashier at Coronna Road.

Q You said you were frequently in the office every day during [107] the month of March?

A Oh, yes.

Q Okay.

A When I was promoted in December, that's where I would generally meet. I would clock in at the office at 9:00 and get my jobs; my job duties for the day and then I would go from there.

Q Did you have occasion while you worked in the office to answer the phone?

A Yes, I did.

Q How often would you do that?
A Well, while Lora was on a break or while she was on her lunch hour I would answer it.
Q How many times a week would that be?
A Three to four.
Q When you answered the phone, did you ever take phone calls from Mildred Sabo?
A Yes, I did.
Q About how often?
A When I answered the phone, probably two or three times out of the hours that I answered the phone.
HEARING OFFICER: Did you work three times in that month?
THE WITNESS: No, you see, I would only cover the phones for an hour a day and then it would be like three or four days a week, and in that hour at least, like she would call Monday, [108] Tuesday and Wednesday during that hour while I covered the phone. It wasn't every time that I covered the phone for Lora's lunch hour or break that she would call.
HEARING OFFICER: How many in a week would you say she would call?
THE WITNESS: When I answered the phone, probably three to four.
HEARING OFFICER: Okay.
Q Who would she ask for?
A Dick or Jim.
Q Dick Sabo or Jim Sabo?
A Yes.
Q Did other cashiers call asking for Dick Sabo or Jim Sabo?
A I never took a call.
Q When you were working in the office, did you see Diane Sabo working?
A Yes, I did.
Q Did Diane Sabo—did you see who Diane Sabo ate her lunch with?

A At the table. There is a lunch table that seats approximately eight people and she would sit at the lunch table with us or with Dick.
Q Did she ever go out to lunch?
A Yes.
Q Who would she go out to lunch with?
[109] A I have seen her go out with Dick and Bob Sabo and a sales rep from another company. Sometimes all by herself. She would go get something to eat and bring it back.
Q Did the other office employees ever go out to lunch with Dick and Bob Sabo?
A No.
Q Did you observe Diane Sabo taking breaks?
A Yes, she did.
Q Did you observe where she would go on her breaks?
A Well, she was not on the schedule with the rest of the office employees as to when she was required to take her breaks, so she took it whenever she wanted to.
Q Where would she go?
A She would sometimes sit in the lunchroom, sometimes she would go into Dick's office.
Q What other office employees—would other office employees go into Dick Sabo's office on break?
A I would say only if they had a problem. I never seen anybody go in there.
Q Is there a schedule posted for when employees are to take breaks?
A Yes, there is.
Q And you said Diane Sabo was not on that?
A That's correct.
MS. GUREWITZ: Nothing further.
[110] HEARING OFFICER: Mr. Katz?

CROSS EXAMINATION

BY MR. KATZ:

Q When did you leave the office area to become a cashier? Did you say April 1?

A No, I think it was later than that. I have got the date written at home. It would be right around the middle of April.

Q Did you hear other witnesses testify that the schedule was posted and Mrs. Sabo worked pursuant to a schedule, did you hear testimony on that this morning?

A Did I hear testimony?

Q Did you hear the other witnesses testify that Mrs. Sabo worked pursuant to a schedule, were you in the courtroom today?

A Yes, I was, but I'm trying to think of what you are talking about.

Q Did you hear Marianne and there was one other witness, I believe, who were asked and testified that there was a schedule, a work schedule and that Mrs. Sabo worked two days a week on it according to the schedule?

A Oh, you mean supposedly Tuesday and Thursday?

Q Yes, or no, did you hear that testimony?

A Yes.

Q Okay. After you were merchandising coordinator, you were going to be promoted to something else, is that correct?

A I was promoted to something else.

[111] Q And now you are a cashier?

A Yes.

Q Which is not a promotion?

A It's a demotion.

Q Demotion. So you feel fairly bad about that?

A I would say so.

Q And you were also during the course of the election, you were a union observer during the election?

A Yes, I was.

Q So that that was a pretty bitter pill to have to swallow to have to come down to cashier, isn't it, wasn't it?

A Yes.

Q Did you hear—oh, the lunch hour, do I understand that's an unpaid hour?

A Correct.

Q How many stores did you cover when you were merchandising coordinator?

A There were nine in Lansing—nine in Flint and nine in Lansing.

Q And how often would you go to Lansing, each week?

A Yes.

Q You would cover each store?

A Yes.

Q And then on top of that, you had to cover how many stores in Flint?

[112] A There are nine.

Q Nine stores. And on top of that, at least for the last month, you were in the office for at least a half a day?

A The last month?

Q March, at least from March?

A I was there every day all day long.

Q Every day all day long?

A Yes.

Q So you weren't in the stores in March and April?

A I was there for the month of March and half of April.

Q And then you were a cashier in Store 11 on Corunna Road?

A Right.

Q You did not work Store 6?

A No.

Q So during the course of this time as coordinator, you had to cover 14 or 15 operations between two cities. How far is Flint from Lansing?

A 50 miles.

Q An hour basically, give or take?

A Yes.

Q So you were driving and you came to a store, and what did you do, put up a display, move things around?

A Yes.

Q Was there a certain area you did that?

A Each store is different.

[113] Q Okay. I would assume with that kind of a schedule, you would have to hustle when you went into the store?

A Yes.

Q That would not be an easy task to do if you were covering 15 stores?

A Correct.

Q So when you got in there, your attention was focused on building that display and getting your work done as coordinator, was it not?

A Correct.

Q Did you hear testimony by the prior witness, I believe her name [i]s Val, that the employees had use of the phones and could make calls?

A Yes, I did.

Q Would you know whether or [n]ot Mrs. Sabo was disciplined for missing a meeting, a sales meeting in writing?

A I don't know that in writing.

Q But you never were?

A I never was. I attended every meeting but that one.

Q But you weren't disciplined?

A No, because not every one attended every meeting.

Q Okay. Not everybody was disciplined?

A Correct, not until recently.

Q Is it your testimony that once you got to a store, it took you between two and three hours to set up the display that [114] you had to do?

A Correct.

Q What were your hours, 8 to 4?

A They varied. Sometimes I would work from 7 in the morning until 9 at night and sometimes I would

work from 8 to 4. On Thursday or even at Wednesday, at my 40 hours, I would clock out and leave and start Friday.

Q When you got to 40 hours, you stopped?

A Right. If it was Wednesday, I stopped.

Q Wherever you were on the old schedule, when you made 40 hours, that was it?

A Yes, unless I was in Lansing and then of course, I had overtime.

Q That was your drive back, but otherwise you were on a 40 hour week?

A Right.

Q And in that 40 hour week, you had to cover between two cities separated by an hour, 15 stores?

A Right. Sometimes, I didn't go to Lansing every week. Dave Tauiker would handle that and I would handle Flint.

Q The other cashiers in the stores, are they mostly your age, fairly young?

A They vary.

Q I don't know how old you are, but you look fairly young.

A They vary. I would say they vary quite a bit. At Dort [115] Highway, they have got both older women there until Val came and then they transferred.

Some stores do without a cashier and the parts man run the register or the manager.

Q Do you know Mrs. Sturgis, Mrs. John Sturgis?

A She was a cashier?

A Yes.

Q As a matter of fact, she used to wear a dress when she was a cashier, isn't that correct? You saw her in a dress when she was working there?

A I never did. I tried to wear a dress one time and I was—it was Christmas Eve—

Q If she were a dress, you wouldn't know it, would you?

A Well, she worked in my store. I never saw her wear a dress though.

Q You never saw her wear a dress?
A Most of the time, it was corduroys.
MR. KATZ: Nothing further on cross.

* * * *

[116] MILDRED SABO

was called as a witness by and on behalf of the Employer, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KATZ:

Q Mrs. Sabo, where are you employed?
A Action Automotive, South Saginaw.
Q That's commonly referred to as Store No. 6?
A Yes.
Q And what is your position?
A I am a cashier.
Q Full time or part time?
A Full time.
Q Who does your scheduling?
A My manager at any given time.
Q And do you fall under anybody's supervision?
A Do I what?
Q Who supervises you?
A The manager.
[117] Q To your knowledge, do you receive any benefits different than any other employee?
A No, sir.
Q Did you get a copy of the employee handbook?
A Yes, sir, I did.
Q Is that what applies to you, whatever is in there?
A Absolutely.
Q How many years have you been with the company?
A Eleven.
Q That includes the predecessor company?
A Yes.

Q What is your hourly rate?
A $4.50 an hour. It wasn't always that.
Q Did you ever serve as a courier for the company?
A Yes, I did, for a long time.
Q Do you fill out a time card?
A I do.
Q Do you fill it out or punch a timecard?
A Fill it out. It's a carry over from what it used to be. That's the way we did it at that time.
Q You continued to do that?
A Yes, I did.
Q Is store No. 6 a busy store?
A It's a very busy store at all times.
Q Is that the only one that has mechanics and a service center?
[118] A Yes, sir.
Q What shift do you work, days or nights?
A Now I work the first shift. There was a time when I worked nights. That was a long time ago.
Q Now, with regard to working the day shift, how many times did you ever work together with Valerie?
A We never worked together, never.
Q Now, prior witnesses mentioned something about seeing you polishing your nails. Has that ever occurred?
A Oh, we have a little box and other cashiers have their cosmetics so to speak and if I have done this once, it was because of punching the register, there is a breakage on the nails. It wasn't really for—it was really for protection more than anything else.
Q Have you ever observed other employees using whatever cosmetics they had?
A Sure I have.
Q Were they ever disciplined for doing that?
A That I can't answer.
Q To the best of your knowledge, did you work pursuant to your work schedule?
A Yes, oh, yes.
Q When it says come in at 9, you were in at nine?
A Yes.

Q At any time, did you ever have any conversations with [119] anyone in management about firing a store manager?

A Never. I have no authority to even think it let alone say it.

Q Do you wear a vest?

A Yes, I do.

Q Do you wear a name tag?

A Yes, I do.

Q The vest is the uniform, is that correct?

A Yes.

Q That's the same vest as—

A Exactly except for different sizes.

Q I would hope. How many times did you see Linda Payne at Store No. 6 from December to say March?

A Very few times and when she came in, it was for maybe like 15 minutes. She hung up a few air fresheners, went over to the parts counter and talked to the men there.

Q Did you ever wear slacks?

A Always.

Q Do you ever wear a skirt?

A Sometimes when I had a doctor's appointment and I had to leave the store to go immediately to the doctors, I wore a skirt.

Q Generally speaking though, what do you wear?

A Slacks. I have a closet full.

Q Do you wear a bra?

[120] A Absolutely, at my age, you have to.

MS. GUREWITZ: I can't believe you asked her that.

MR. KATZ: I had to ask that.

(Laughter)

MR. KATZ: If you can't have any fun at one of these—

Q As a cashier, have you ever dusted?

A Absolutely.

Q Do you stock shelves?

A I have. That's a busy busy store and we are kept there at the cashier counter more than we are on the floor because there are people coming in all the time.

Q Is that particularly busy to your knowledge during the day?

A Yes. Yes.

Q Have you worked day and night?

A Yes.

Q Which is busier?

A Daytime, definitely.

Q Are you the only cashier on duty?

A Yes. I have to ask my manager for cloths to do the dusting and they know I have asked for them.

Q Are you exempted from doing anything that any other cashier does?

A No.

Q Other than perhaps of time constraints because of [121] business?

A That's right.

Q Can you recall an occasion where you left $1,200 in a drawer?

A Never. I was a courier at one time and I am aware of the box being cleaned out, and I have never done that.

Q Do you do a box check?

A I do. I do.

Q Do you know of occasions where people have not done box checks, if you know personally?

A No, I don't know. I can't answer that. I do my job and that's it.

Q Mrs. Sabo, have you ever been disciplined?

A Yes.

Q Approximately how many times?

A Four, three or four times.

Q Are these in writing?

A Oh, yes, I have to sign them.

Q You sign the disciplines?

A Yes.

Q Do you have them with you?
A Yes.
Q Did you sign each discipline?
A Yes, I did.
Q Were you ever disciplined for not wearing a vest?
[122] A Yes, in the beginning. They had to find one to fit me.
Q Do you attend management meetings or rather the meetings that were discussed, employee meetings?
A Usually. One I did not.
Q One time?
A Yes, it was very important that I did not be there. I had something very important.
Q What happened? Were you disciplined?
A I was disciplined for it, but it was in the family. It was my mother. I had to ride out there which is all the way across town.
Q Were you disciplined?
A I was.
Q In writing?
A I was.
Q Did you sign for it?
A I did, yes.
Q Were you ever disciplined in writing for excessive use of the phone?
A Yes.
Q By whom?
A Whatever manager it was at the time.
Q Would you take a look and see if they signed it?
A Yes, I will. Mr. Taulker.
Q Were you ever disciplined for being late to work?
[123] A Yes.
Q In writing?
A Yes.
Q Do you live with Jim Sabo?
A Yes, I do.
Q Is there any cost to you for living there, for the privilege of living there?
A Yes, there is.

Q What if anything?
A I buy all the groceries, all the furniture in the house belongs to me, and if there are any kinds of maintenance to be done, I see to it that it's done.
Q Who is in charge of housekeeping?
A I am.
Q There is a difference between a box check and closing the register isn't there?
A Yes, there is.
Q You don't close the register?
A I am not on night shift to close it, but I do box checks.
MR. KATZ: Nothing further on direct.
HEARING OFFICER: Ms. Gurewitz?

CROSS EXAMINATION

BY MS. GUREWITZ:

Q Is the house where you live with Jim Sabo his house or your house?
[124] A His house.
Q You said you were responsible for maintenance, is that for maintenance of the furniture or maintenance of the home?
A Of the walls, of everything, the painting, the redecorating. The lawn work.
Q Does your son, Richard, live close by?
A Oh, I would say ten minutes away.
Q And how about Robert?
A 15.
Q Do you see them very often?
A Oh, I see them in the daytime quite a bit and on social occasions in the evening, yes, we do some things together.
Q You see their families frequently? They have children?
A Yes, I have grandchildren.

Q Did you say you had the disciplinary notices with you?

A Yes, ma'am.

MS. GUREWITZ: I have nothing further.

MR. KATZ: Nothing further.

HEARING OFFICER: Very well, you're excused.

(Witness excused.)

• • • •

JOHN STURGIS

was called as a witness by and on behalf of the Employer, having been first duly sworn, was examined and testified as follows:

• • • •

[127] Q Now, John, first of all, did your wife ever work for Action Automotive?

A Yes, she was a cashier.

Q Did you ever see her dress when she operated as a cashier?

A Yes, she wore a dress I'm going to venture to say at least once a week.

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EMPLOYEE INFORMATION MANUAL

ACTION AUTOMOTIVE AND

LANSING LEWIS

January 1991

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January 2, 1981

I. COMPANY HISTORY AND PHILOSOPHY

Action Automotive is one of the largest automotive parts retailers in Michigan, yet Action is a very young company. It didn't even exist in 1975.

Action opened its first store in March, 1976, in Flint Michigan. Today, what had started as a single store outlet has become a multi-million dollar auto parts chain with its own data processing center, warehouse distribution system, wholesale marketing staff and purchasing division. The company operates a gas and oil distribution subsidiary, ACE hardware stores, multi-bay service centers, convenience food stores and self service gasoline stations.

What causes such growth? Consumers want what Action gives them. Brand name parts, discount prices and parts people who know parts. Perhaps more importantly, the company puts stores where people want them and keeps them open when they want to shop. All Action stores are open seven days and nights.

Happy stores make happy customers. Actions principle of customer satisfaction allows every employee to assure their customers that they will receive quality merchandise, service and satisfaction.

Each employee should perform to the best of his or her ability and show they care about what they are doing. Any other attitude will be felt by our customers. A warm, sincere greeting, together with a smile, will set the stage for better customer relations and improved sales. After all, the customer *is* paying our wages.

Use these basic ideas constantly and your success with Action will be assured:

a. Be a professional Salesperson—your first job is to sell! Don't hesitate to ask your customer to buy. They may only need your suggestion as a reason to purchase. Give every customer the best service that you possibly can, and make them know that their business is ap-

preciated. *Service* is what makes our company better than the competition.

b. Earn a profit for your company. Never make special deals or offer extra discounts. Our products are worth the prices marked. If a customer says that an item is cheaper elsewhere, point out the company policy of matching competitive advertisements, and be sure that they are aware of the Preferred Customer Card program.

c. Employees working in non-sales capacities must realize that their functions are needed to support the stores and their customers. Every store employee depends on the office to provide fast and accurate information. Always assume that a customer is waiting for an answer when the stores call for assistance. The need for information cannot be delayed because a customer may be waiting to make a buying decision.

II. GENERAL POLICIES AND PROCEDURES

As in any organization, Action has rules and regulations. These rules must be followed. In addition, the Company has published an Operations Manual containing those steps necessary to complete any given job. These rules and operational procedures must be followed in order for every one to function effectively and efficiently. Read the following rules carefully. Breaking any company rules will result in dismissal.

Your application for employment is considered to be a statement of fact and must be filled out accurately. Mis-representation or false statements on the application will result in termination of employment. The first thirty days of employment are considered to be probationary. Individuals who cannot learn and perform their duties satisfactorily within that period will be released. If you have difficulty understanding your job, you should ask for help from your supervisor.

The work week and pay periods are explained under their headings. Absence due to illness, bereavement and occasional personal business are permitted so long as

written permission is obtained prior to missing work. Deviation from scheduled work hours must be approved in advance, in writing, by your supervisor. Employees are required to remain on company premises during scheduled hours or have permission to be absent. Persons not on the premises must be punched out in compliance with the section of the Operations Manual on time cards and schedules.

A. Care and Control of Company Property

All employees will care for and protect company property to keep it safe and in proper working condition. Careless use of equipment resulting in loss or damage will be charged against the person using it. Reports of severe abuse or neglect will be grounds for termination of employment. Equipment which appears to be damaged or unsafe must be reported to your supervisor immediately. Money, merchandise, tools, equipment and other items found on company property are the property of Action Automotive or Lansing-Lewis. Any person taking such items, regardless of value, will be considered to be stealing and will be terminated immediately.

B. Accidents and Injuries

Any injury or accident however slight, must be reported in writing within 24 hours to your supervisor or to the main office. Accident report forms are listed in the Operations Manual.

C. Prohibited Articles and Substances

Alcohol, drugs or any other illegal substance on company property are strictly forbidden. Weapons of any type are also prohibited unless authorized in writing by senior management. Possession of these items or working under their influence will result in immediate dismissal.

D. Dress Code

Action Automotive and Lansing Lewis expect their employees to present a neat, well groomed and uniform appearance at all times. Clothing will be clean and neat, meeting the standards or requirements for the classification of the job. Hair must be neat and properly trimmed. Stringy, unkept hair and extreme styles which are offensive to customers and management will not be allowed. Individuals whose personal appearance and odor are offensive to others will be asked to clean up or work elsewhere. Drivers and mechanics will wear Company designated, color keyed uniforms, which will generally be leased from a local laundry company. Retail employees are required to wear the brown Action vest and name tag while on duty. Male retail employees will wear solid color slacks and dress style shirts with a buttoned collar and necktie. Female store employees will wear a blouse and slacks. Dresses and skirts may not be worn. All clothing is to be of a modest design, and proper undergarments will be worn. Fashions and styles which tend to create a non business like atmosphere are not allowed. Blue jeans are never acceptable. Sweaters may be worn for personal comfort. Jackets with emblems or logos other than those of Action Automotive or Lansing Lewis are forbidden. The company will provide name tags and vests to each retail employee. Each new employee will sign a receipt for each item and provide a authorization for payroll deduction of an amount sufficient to cover loss or damage of either item.

Store Hours and Holidays

All stores operate seven days per week. We must be open to serve the needs of our customers when they are free to do their repairs. Action Automotive closes on four holidays; Thanksgiving Day, Christmas Day, Easter and New Years Day. Reduced hours may be declared on other holidays by management.

1. Department and Store Schedules

Each store manager or supervisor writes the work schedule for their department, consistent with company policies. They are responsible for proper manning of the department. Employees are responsible for being at work on time and in the proper uniform when their shift starts, and they will remain on the job until their scheduled shift is complete. Everyone is expected to give an honest days work. Management may adjust work schedules and reduce hours when necessary if business does not support the expense. If an employee cannot report to work on time, then the employee is responsible for calling their supervisor at least one hour prior to their scheduled starting time. Unauthorized absence or tardiness three times within a thirty day period is the basis for dismissal.

2. Time Cards

All employees are required to punch in and out. Persons failing to do so must have their supervisor write in their times immediately. Failure to punch in or out will result in not being paid for the times in question. Hours worked are calculated in quarter hours. A quarter hour starts on the hour and every fifteen minutes thereafter. Only supervisors can write any employee in or out and correct a time card. Supervisors must initial any times worked that are different from previously written schedules. Arriving early or leaving later than scheduled is not permitted unless the supervisor has requested and authorized the excess time. Breaking these rules will result in termination.

F. Grievances

Action provides current, liberal and realistic benefits to its employees. In return, the company expects each person to perform their duties efficiently. Results are the criteria by which job performance is judged. Manage-

ment continually looks for and eliminates problems, inefficiency and waste. When any person feels that they have been judged unfairly, they are welcome to discuss the problem with their supervisor first. If a satisfactory solution cannot be found, management will make a decision and all parties to the grievance will abide by it. Discussion of grievances with other employees is not good manners or business and will be avoided. Good sportsmanship and understanding will make work more pleasant and efficient.

G. Transfers and Termination

In the selection of new employees, Action tries to choose individuals whose training, experience and background best fit them to the requirements of the job. All employees are probationary for the first thirty days. If the performance of any person is less than satisfactory, they will be terminated. Reasons for this will include violation of rules, failure to follow instructions and inadequate performance of duties. Normally, a person will be warned, orally or in writing, depending on the severity of the infraction, up to three times.

Individuals may be transferred between stores or positions depending on the needs of the company. As positions become vacant, employees may request transfers. Approval is at the discretion of management.

In the event of termination, all employees must complete the clearance procedure detailed in the Operations Manual prior to receiving final checks. Pay checks must be processed through the regular payroll cycle to allow any commissions and charges to be accounted for.

H. Pay and Promotions

Action recognizes that personal income and satisfaction are the reasons for working. Recognition and advancement are primary motivations for excellence in job performance. Action conforms with all State and Federal minimum wages and provides additional incentives in the form of personal sales commissions to allow each employee to increase their income. The details of the current sales commission programs are outlined in the Operations Manual.

1. Wages: Each employee is paid a mutually agreed upon wage. That wage is considered confidential, to be discussed only with management. Discussion of wages between employees frequently arouses jelousy and disagreement and such discussion is strongly discouraged.

2. Commissions: Action pays sales commissions to reward sales effort. Additionally, Fuel Oil drivers earn a commission based on volume of sales and mechanics are paid on a commission basis. Earnings of each individual are based upon his or her sales volume and allow everyone to achieve the income levels they are willing to work for. Since the intent of any such program is to improve sales and profits, Action reserves the right to change or modify the programs at its option. Employees are encouraged to submit suggestions that will benefit both the company and the employee. Commissions are paid on regular payroll checks and can be identified by the code letter "C". Payment of commissions is subject to the employees meeting the requirements specified in the program announcement.

3. Bonuses: Periodic bonuses are awarded at the discretion of management. These bonuses are given for attainment of exceptional objectives. Bonuses are paid on regular payroll after the first of the month and are identified by the letter "B". Bonuses may be withheld by management for such reasons as failure to comply with instructions, inadequate job performance and poor attitude.

4. Promotions and Wage Increases: Action adjusts pay and rewards superior performance through several means. Seniority alone is not adequate justification for increases. Job performance and results are the reasons for advancement. Management reviews all employees on

a periodic basis. These reviews are normally done semi-annually, and are intended to compare job performance, insure that employees performing similar duties are being paid similar rates, and to evaluate exceptional individuals. Decisions are based upon attitude, sales results, punctuality, efficiency and professionalism.

5. Payroll Corrections: Any corrections to payroll and any questions regarding paychecks are to be brought to the attention of your supervisor and then to the payroll department.

6. Pay Dates: Action Automotive and Lansing-Lewis pay twenty-six times per year. Checks are issued on the Friday of the week following the end of the pay period. New employees will receive a check on the first payday in which they have earned credits. That may be as many as three weeks following the hire date. Pay periods start on Friday and end with the close of business the following Thursday. Payroll is compiled for two work weeks. Checks are processed and issued on the Friday following the end of the pay period.

Action will pay employees only for hours scheduled in writing or for hours required by management. Payroll is compiled based on approved written schedules, and supported by time clock entries on each persons time card. Scheduling is based upon a controlled labor budget, and each employee must help avoid running over the budgeted time. If one person works beyond his allocated time, they will cut down someone elses hours. Work hours can only be authorized by management and times in excess of those shown on the schedules must be approved. Unapproved times will not be paid. The rules regarding scheduling, time cards and payment are outlined in the Operations Manual.

III. Fringe Benefits

Action Automotive and Lansing Lewis provide complete and up to date fringe benefits. These benefits are available only to full time employees. Full time is de-

fined as those who work a minimum of 40 hours per week. In addition, qualification for fringe benefits occurs on the first day of the month following attainment of ninety days satisfactory employment as a full time employee. Those persons who have been rehired must qualify based upon the most recent hire date. Co-op, part-time and other non regular employees are excluded from any fringe benefits.

A. Vacations

Action Automotive and Lansing Lewis vacation schedules apply to persons who have completed one full year as a full time employee, based on their hiring data in that capacity. Personnel who have met this criteria are eligible for the paid vacation specified below. Years of service for the second and subsequent years will be based upon completion of calendar years, following the first year. Vacation benefits are based upon the following schedule:

Years of Service	Paid Weeks Vacation
1-3	1
4-7	2
8-12	3
13-20	4
Over 20	5

Vacations will be paid at the rate in effect on the last payroll prior to the vacation. Bonuses, commissions and overtime are not considered in vacation pay. Vacation time must be used by December 31st of the current year. Vacation time cannot be accumulated. If it is not used, it is lost. Requests for vacation must be submitted in writing at least 90 days prior to the dates requested. Approval is based upon the needs of the company. Any requests received less than the required lead time are

subject to disapproval or change. Final approval will be made at the main office.

Individuals who terminate for any reason lo[]se all claims to vacation or payment for accumulated vacation.

B. Insurance

Action Automotive and Lansing Lewis subscribe to life, health and disability income insurance programs for their employees benefit. Eligibility for these programs is based upon the completion of 90 days full time employment.

1. Life Insurance: Life insurance benefits range from $5,000.00 to $50,000.00, depending on service and the position of the individual. This benefit includes accidental death and dismemberment benefits.

2. Disability Income: This benefit is available to full time employees in amounts set for the position and service of the individual. This plan provides for payment of benefits when disabled, with benefits payable from the first day when caused by accident, and from the eighth day in cases caused by illness. This benefit does not pertain to work related injuries, which are covered under workmans compensation benefits.

3. Health Insurance: The health insurance plan calls for basic hospitalization coverage in full when admitted as an in-patient. In addition, a Major Medical provision allows for out-patient protection subject to certain individual and family deductables. Benefits after meeting these deductables is customarily 80% of the charges. These benefits are subject to change, and employees should review the booklet provided or contact the insurance company representative for an explanation of the policy. Family coverage is available to hourly wage employees at their expense. Premiums for the difference are collected by payroll deduction. Family coverage for members of salaried management is provided at company expense.

C. Sick and Holiday Pay: Only salaried management is eligible for sick or holiday pay, and only to the extent specified in the Management supplement of this manual. No hourly rated employee will be paid unless they are punched in and working.

D. Employee Discounts: Action buys and prices quality merchandise at competitive prices. These prices are set at the lowest level possible to allow the company to earn a profit. Employees are not allowed to negotiate any price. The only deviations from published prices are those given to holders of discount cards and prices being met under the policy of matching competitive pricing. The rules governing these programs are published in the operations manual. In addition, employees are allowed a discount of 10% on all merchandise and services except for tobacco and food. The discount on gasoline for personal use is 02¢ per gallon. This employee discount applies to sale items and service labor also.

E. Profit Sharing Plans: Action Automotive and Lansing Lewis each provide profit sharing plans for their employees. These plans have been set up by each corporation, and are similar in benefits. These plans are administered by a Plan Trustee as required by the Internal Revenue Service. The company will provide you with a "Summary Plan Description" and will assist employees in contacting the proper person. Profit sharing plans grow only to the extent that the companies are profitable and can make contributions; therefore, every employee must make a strong effort to insure profitability.

F. Educational Assistance Programs: Action has established a program to assist deserving individuals who wish to study in work related fields. Details of this program are in the Operations Manual.

SUPREME COURT OF THE UNITED STATES

No. 83-1416

NATIONAL LABOR RELATIONS BOARD, PETITIONER
v.
ACTION AUTOMOTIVE, INC.

ORDER ALLOWING CERTIORARI

Filed May 14, 1984

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Sixth Circuit* is granted.

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PETITIONER'S

BRIEF

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NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ACTION AUTOMOTIVE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTION PRESENTED

Whether, under Section 9(b) of the National Labor Relations Act, 29 U.S.C. 159(b), the Board may exclude from a collective bargaining unit employees who are close relatives of the owner-managers of a closely held corporation that employs them, without finding that the employee-relatives receive special job-related privileges.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1416

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ACTION AUTOMOTIVE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 717 F.2d 1033. The decision and order of the National Labor Relations Board (Pet. App. 7a-20a) are reported at 262 N.L.R.B. 423. The Board's decision, direction, and certification of representative (Pet. App. 21a-23a) and the hearing officer's report and recommendations (Pet. App. 24a-47a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1983 (Pet. App. 6a). On December 15, 1983, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and includ-

ing January 28, 1984. On January 19, 1984, Justice O'Connor further extended the time for filing a petition to and including February 27, 1984. The petition for a writ of certiorari was filed on February 24, 1984, and granted on May 14, 1984 (J.A. 76). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 2(3) of the National Labor Relations Act, 29 U.S.C. 152(3), provides in pertinent part:

> The term "employee" * * * shall not include * * * any individual employed by his parent or spouse * * *.

Section 9(b) of the National Labor Relations Act, 29 U.S.C. 159(b), provides in pertinent part:

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this [Act], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof * * *.

STATEMENT

1. Respondent is an automobile parts and gasoline dealer with outlets in a number of cities in Michigan (Pet. App. 2a). The dealership—a closely held corporation—is owned equally by three brothers, Richard, Robert and James Sabo, who are president, vice president and secretary-treasurer, respectively (J.A. 9-10). The three Sabo brothers are actively involved in respondent's daily operation; together they make all of its policy decisions and retain ultimate responsibility for the supervision of all of its departments (Pet. App. 2a; J.A. 31-33).

On March 31, 1981, the Retail Store Employees Union, Local 40 (the Union) filed a petition with the Board requesting that a representation election be held among respondent's employees (Pet. App. 24a). Respondent and the Union stipulated to elections in two bargaining units—a unit of store and warehouse employees at respondent's nine retail stores (Unit A) and a unit of office clerical employees at the headquarters office (Unit B) (*id.* at 24a-25a). The election was held on May 29, 1981, and the Union received a plurality of the votes in each unit, but a sufficient number of ballots was challenged to place the outcome of the election in doubt (*id.* at 25a).[1]

2. The only challenged ballots of significance here were those of Diane and Mildred Sabo. Following a hearing, the Board's hearing officer recommended excluding both of them from their respective units and sustaining the challenges to their ballots because of their close family relationship with the three brothers who own and operate respondent (Pet. App. 29a-33a, 34a-37a).

The hearing officer found that Diane Sabo is the wife of respondent's president, Richard Sabo. She is a regular, part-time general ledger clerk at respondent's headquarters office in Flint, Michigan (Pet. App. 30a; J.A. 9, 11-12). She resides with her husband and both work at the same office (Pet. App. 30a). At work, Diane Sabo often goes to lunch with

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[1] The vote in Unit A was 20-18 with one challenged ballot—Mildred Sabo's. The vote in Unit B was 4-3 with five challenged ballots, including that of Diane Sabo. The challenged ballots were determinative in both units because respondent alleged and the hearing officer found that one of the challenged ballots cast in Unit B (Fred Britton's) should have been counted in Unit A (Pet. App. 27a, 44a-45a).

Richard and one or both of his brothers. She regularly takes her breaks in Richard's office (*id.* at 31a; J.A. 50-51). It is undisputed that she is the only clerical employee who works part-time, receives a salary rather than hourly pay and does not punch a time clock. She is paid $100 a week and is expected to work 20 to 25 hours per week (*id.* at 12-13, 20-21). In addition, she is allowed to take her breaks when she pleases, instead of according to the schedule established by the office manager (Pet. App. 30a-31a; J.A. 51).

On the basis of these findings, the hearing officer declined to conclude that Diane Sabo enjoys any "special privileges," but nevertheless held that she "has a community of interest separate from that of the office clerical employees in unit B" and therefore recommended that the challenge to her ballot be sustained (Pet. App. 33a).

Mildred Sabo was found by the hearing officer to be a full-time cashier at one of respondent's retail stores in Barton, Michigan (Pet. App. 33a-34a). She is the mother of the three Sabo brothers who own and operate respondent (J.A. 10). She lives with Secretary-Treasurer James Sabo in a house that he owns; she sees or has contact with her other sons and their families regularly (Pet. App. 33a, 35a; J.A. 50, 60-61). At work, Mildred Sabo, unlike other employees, is not required to punch a time clock; she records her time on a card (J.A. 21-22). She earns 25 cents per hour more than any other cashier, but she is also one of respondent's most experienced cashiers (Pet. App. 34a; J.A. 26).

Based on these findings, the hearing officer concluded that Mildred Sabo does not receive any "special privileges" with respect to her job (Pet. App.

36a). Nevertheless, he concluded that, "in view of her relationship" with her three sons, "Mildred Sabo's interests are more closely aligned with management than with [respondent's] employees" (*ibid.*).

The Board adopted the hearing officer's findings and recommendations, but noted that Diane Sabo should be excluded from the unit not only because of her relationship to respondent's owners, but also because she enjoyed special job-related privileges, viz., "her irregular work schedule, her breaks and lunches with corporate officers in corporate offices, her being paid a salary rather than hourly pay, and not being required to punch a time clock" (Pet. App. 21a-22a n.2). The Board certified the Union as the exclusive representative in Unit A, and directed the Regional Director to count two of the other challenged ballots in Unit B, which resulted in a tally of 5-4 for the Union and the Union's certification in that unit as well (Pet. App. 15a, 22a; J.A. 3-4).

Respondent then refused to bargain with the Union, contending that the certifications were not valid. The Union filed charges with the Board, and the Board, declining to reconsider its earlier certification determination, found that respondent had violated Section 8(a)(1) and (5) of the Act, 29 U.S.C. 158 (a)(1) and (5), and ordered respondent to bargain with the Union (Pet. App. 7a-18a).

3. The court of appeals denied enforcement of the Board's order (Pet. App. 1a-5a). Relying on its decisions in *NLRB* v. *Hubbard Co.*, 702 F.2d 634 (6th Cir. 1983); *Cherrin Corp.* v. *NLRB*, 349 F.2d 1001 (6th Cir. 1965), cert. denied, 382 U.S. 981 (1966), and *NLRB* v. *Sexton*, 203 F.2d 940 (6th Cir. 1953), the court held that the Board had no authority under Section 9(b) of the Act, 29 U.S.C. 159(b), to exclude individuals from bargaining units solely because of

their close family relationship with those who own and operate the business (Pet. App. 3a). Instead, the court concluded that "familial ties can only be considered as evidence of a special status when the employee receive[s] job-related benefits or other favorable working conditions which flow from the relationship" (*ibid.*).

Applying this standard to the two employees at issue, the court of appeals found that "[t]he only factor of Mildred's special status is her family ties to the Company * * * [and] such family ties alone are insufficient to establish 'special status'" (Pet. App. 5a). With regard to Diane Sabo, the court acknowledged that her "work schedule differed significantly from that of her fellow employees," but concluded that such a "single instance of a special treatment is insufficient evidence of a 'special status'" to support the Board's order (*id.* at 4a-5a).

SUMMARY OF ARGUMENT

A.

Section 9(b) of the National Labor Relations Act, 29 U.S.C. 159(b), authorizes the Board to determine "in each case * * * in order to assure to employees the fullest freedom in exercising the rights guaranteed by [the Act], the unit appropriate for the purposes of collective bargaining * * *." In the exercise of its discretion under Section 9(b), the Board has long held, as it did in this case, that close relatives of owners of closely held corporations, although employees within the meaning of Section 2(3) of the Act, 29 U.S.C. 152(3), should nonetheless be excluded from bargaining units where the family relationship is such as to remove the employee-relative from a "community of interest" with the other employees. See *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 194 (1981) (Powell, J., dissenting).

In denying enforcement of the Board's order, the court of appeals disregarded the Board's broad authority to shape bargaining units in order to foster efficient collective bargaining and to protect the rights of employees to organize and bargain collectively through representatives of their choosing. See, *e.g.*, *South Prairie Construction Co.* v. *Operating Engineers*, 425 U.S. 800 (1976).

B.

The Board's longstanding practice of excluding employees who are closely related to management ensures the cohesiveness among employees necessary for effective collective bargaining and protects the Section 7, 29 U.S.C. 157, right of employees to bargain free of undue influence by those aligned with management. Employee-relatives, particularly those who reside with owners or active managers of the business, have an access to management not shared by other employees. *Parisoff Drive-In Market, Inc.*, 201 N.L.R.B. 813 (1973). Moreover, an employee-relative who is financially dependent on the owner is likely to be motivated by considerations very different from those that affect other employees performing similar jobs. Because of these divergent interests, the Board, relying upon its expertise in labor-management relations, has concluded that to include such relatives in the same bargaining unit with other employees may result not only in depriving those employees of representation by the bargaining agent of their choice, but, if an agent is selected, in creating conflicts among employees that may significantly impair the bargaining process long after the union is elected.

In addition, the Board's policy of excluding close family members protects both employers and unions in bargaining by minimizing the risk that the deliberations or confidential information of one side will be influenced by or disclosed to the other. Employees who are closely related to the owner of a business are likely to have a divisive effect on the union, which could undermine the union's ability to participate effectively in the bargaining process. Similarly, the exclusion of such employee-relatives protects management by minimizing the risk that a union, in the event of a family squabble or change in loyalties, would obtain from employee-relatives confidential employer information to which they may have access solely by virtue of their family relationship.

Finally, the Board's policy is consistent with the clearly expressed intent of Congress, in enacting the Taft-Hartley amendments of 1947, that all individuals allied with management be excluded from collective bargaining in order to protect the adversary system contemplated by the Act. Congress expressly excluded supervisory employees from the Act's coverage and also intended that managerial employees be excluded from the Act. In addition, Congress did not disturb the Board's longstanding practice of excluding from bargaining units employees who have access to their employer's confidential, labor relations information. The Board's policy of excluding close family members, which also was not disturbed by Congress, helps to preserve the proper dividing line between management and labor that is fundamental to the statutory scheme.

C.

Every court of appeals that has considered this issue, except for the Sixth Circuit, has held that the Board's reliance on Section 9(b) to exclude close family members from collective bargaining units is supported by the Act. See *NLRB* v. *Caravelle Wood Products, Inc.* (*Caravelle I*), 466 F.2d 675 (7th Cir. 1972) and *NLRB* v. *Caravelle Wood Products, Inc.* (*Caravelle II*), 504 F.2d 1181 (1974); *Lion Gear Co.* v. *NLRB*, 608 F.2d 791 (9th Cir. 1979); *NLRB* v. *H.M. Patterson & Son, Inc.*, 636 F.2d 1014 (5th Cir. 1981). The court of appeals here, however, relied upon Section 2(3)'s definition of employee, which excludes children and spouses of employers from coverage of the Act, to restrict the Board's discretion in determining appropriate bargaining units under Section 9(b). This reasoning is erroneous. Simply because an individual is an "employee" within the meaning of the Act does not require that he be included in a bargaining unit if he does not share interests in common with other employees in the unit. See *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, *supra*. The Sixth Circuit's reasoning is thus not a valid basis for restricting the Board's broad authority to determine appropriate bargaining units.

D.

The employees at issue here are the wife of one of three brothers who co-own and manage respondent and the mother of all three. The wife lives with her husband and the mother lives with another of the three brothers. The brothers each own one-third of the business and are active in its management. Both employees have daily contact with the owners. In

these circumstances, the Board reasonably concluded that the two employees' interests differed substantially from those of other employees, and therefore properly excluded them from the collective bargaining unit.

ARGUMENT

THE BOARD HAS AUTHORITY UNDER SECTION 9(b) OF THE NATIONAL LABOR RELATIONS ACT TO EXCLUDE FROM A BARGAINING UNIT EMPLOYEES WHO ARE CLOSE RELATIVES OF THE OWNERS OF A CLOSELY HELD CORPORATION THAT EMPLOYS THEM WITHOUT A SHOWING THAT THE EMPLOYEE-RELATIVES RECEIVE SPECIAL JOB-RELATED PRIVILEGES

A. In Exercising Its Authority Under Section 9(b) To Select Units Appropriate For Collective Bargaining, The Board Generally Has Found That Employees With Close Family Ties To Owners Or Managers Of The Employer Lack A "Community Of Interest" With Their Fellow Employees

Section 9(b) of the National Labor Relations Act, 29 U.S.C. 159(b), broadly delegates to the Board the authority to determine "the unit appropriate for the purposes of collective bargaining * * *." Applying Section 9(b), the Board has long held the view that "employees of a company who are in an intimate [family] relationship with officers of the company" should be "excluded from an appropriate [bargaining] unit." *Jerry & Edythe Beisinger*, 32 N.L.R.B. 1276, 1279 n.4 (1941). See also *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 194 (1981) (Powell, J., dissenting); *Burke Brewery, Inc.*, 54 N.L.R.B. 1061, 1062 n.2 (1944); *Louis Weinberg Associates, Inc.*, 13 N.L.R.B. 66, 69 (1939).[2]

Just as with any other unit determination, the Board's decisions in this area reflect the basic purpose of assuring that the employees in a unit all share a "community of interest." See 15 NLRB Ann. Rep. 39 (1950). See also *Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 172-173 (1971). Accordingly, the Board since the earliest days of the Wagner Act, ch. 372, 49 Stat. 449 *et seq.*, has excluded certain relatives of managerial personnel because "by virtue of the relationship * * * their interests are sufficiently distinguished from those of the other employees to warrant their exclusion from the unit." *Louis Weinberg Associates, Inc.*, 13 N.L.R.B. at 69.

As the Board more fully explained in *P.A. Mueller & Sons, Inc.*, 105 N.L.R.B. 552, 553 (1953) (footnotes omitted):

> The Board's policy of excluding such near relatives is based on Section 9(b) of the Act, under which the Board must in every case determine the unit appropriate for bargaining purposes.

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[2] Where the relative is the child or spouse of the employer, he or she is expressly excluded from the definition of "employee" under Section 2(3) and therefore is entirely outside the Act's protection. Early in its administration of the Act, the Board limited the Section 2(3) exclusion to the child or spouse of a sole proprietor or partner. See *Parkers' Brass Foundry*, 63 N.L.R.B. 1238, 1239-1240 (1945); *O.U. Hofmann & Sons*, 55 N.L.R.B. 683, 684 (1944), enforced, 147 F.2d 679, 681 (3d Cir. 1945); *Cason & Tierney Co.*, 69 N.L.R.B. 523, 525 n.5 (1946). Later, the Board extended the exclusion to the child or spouse of a sole owner of a corporation. See *P.A. Mueller & Sons, Inc.*, 105 N.L.R.B. 552, 553 (1953); *The Colonial Craft, Inc.*, 118 N.L.R.B. 913, 914 (1957); *Bridgeton Transit*, 123 N.L.R.B. 1196, 1197 (1959); *Printing Industry of Delaware*, 131 N.L.R.B. 1100, 1103 (1961). See note 12, *infra*.

> • • • The Board early decided in this connection that the familial bond between an employer and employee is in certain cases so close as to remove the near relative from the "community of interest" shared by the other employees. The interests of such near relatives are identified not with their fellow-workers, but with management itself.

See *Stanislaus Implement & Hardware Co.*, 92 N.L.R.B. 897, 898 (1950).

In its early decisions, the Board automatically excluded employees from bargaining units based on family relationship when it found that they were closely related to a manager or owner of a closely held company.[3] For a period thereafter, the Board

[3] See, *e.g.*, *Jerry & Edythe Belanger*, 32 N.L.R.B. at 1279 & n.4 (brother of partner); *Northwestern Auto Parts Co.*, 36 N.L.R.B. 484, 488 (1941) (son and brother of partners); *Burke Brewery, Inc.*, 54 N.L.R.B. at 1062 n.2 (in-law of company president); *Carolina Box & Lumber Co.*, 57 N.L.R.B. 1355, 1357 (1944) (son of secretary-treasurer); *Casper Lowenstein, Inc.*, 58 N.L.R.B. 1531, 1533 (1944) (son of superintendent); *The Myers-Sherman Co.*, 71 N.L.R.B. 910, 912-913 (1946) (sons of vice-president); *Troy Refining Corp.*, 70 N.L.R.B. 1191, 1193 (1946) (son and brother of general manager and secretary-treasurer); *Association Canado-Americaine*, 72 N.L.R.B. 520, 523 (1947) (son of president); *Superior Bakery*, 78 N.L.R.B. 1172, 1173 (1948) (brothers and uncle of owner); *Peter Pan Bus Lines*, 82 N.L.R.B. 830, 831 (1949) (son and nephew of owner); *Rosedale Passenger Lines, Inc.*, 85 N.L.R.B. 527, 531 (1949) (brothers and nephews of president and vice president); *Stanislaus Implement & Hardware Co., supra* (nephew of president and vice president); *Ashland Body Works*, 95 N.L.R.B. 1520, 1521 (1951) (brothers of partners); *International Metal Products Co.*, 104 N.L.R.B. 1076, 1079 (1953) (son, brothers, brother-in-law and nephews of partners); *P.A. Mueller & Sons, Inc., supra* (son and nephew of owner).

modified its policy to exclude employee-relatives from units only upon a showing that they enjoyed speciai job privileges. See, *e.g.*, *International Metal Products Co.*, 107 N.L.R.B. 65, 67 (1953).[4]

Since 1967, the Board has returned to and maintained its original view that employee-relatives may be excluded from units even in the absence of special job privileges. See *Foam Rubber City #2 of Florida, Inc.*, 167 N.L.R.B. 623, 624.[5] Prompted initially by decisions of the Seventh Circuit, *NLRB* v. *Caravelle Wood Products, Inc.* (*Caravelle I*), 466 F.2d 675 (1972) and *NLRB* v. *Caravelle Wood Products, Inc.* (*Caravelle II*), 504 F.2d 1181 (1974), the Board has adopted a more comprehensive approach to the family exclusion issue and now looks at a variety of circumstances in determining whether the family relationship with someone in management is sufficient to align the employee-relative with management and thus warrant his or her exclusion from the unit. See *Parisoff Drive-In Market, Inc.*, 201 N.L.R.B.

[4] See *American Steel Buck Corp.*, 107 N.L.R.B. 554, 555-556 (1953) (general manager's nephew who assigned work and solicited grievances excluded, but son of the company president included because he did not have special job privileges or status); *KERO Radio-TV*, 116 N.L.R.B. 194, 195 (1956) (brother of president included where evidence showed his higher salary was due to experience and ability, not his family relationship). See also *Research Craft Mfg. Corp.*, 129 N.L.R.B. 723, 726 (1960); *Big Ben's Dep't Store, Inc.*, 160 N.L.R.B. 1925, 1938 (1966), enforced, 396 F.2d 78 (2d Cir. 1968); *Cherrin Corp.* v. *NLRB*, 349 F.2d 1001, 1004 (6th Cir. 1965), cert. denied, 382 U.S. 981 (1966).

[5] In *Foam Rubber City #2 of Florida, Inc.*, the Board expressly overruled *International Metal Products Co.* insofar as that case had required a finding of special job privileges. 167 N.L.R.B. at 624 n.10.

813, 814 n.2 (1973).[6] The primary factors the Board considers are (*Caravelle I*, 466 F.2d at 679):

> [H]ow high a percentage of stock the parent or spouse owns, how many of the shareholders are related to one another, whether the shareholder is actively engaged in management or holds a supervisory position, how many relatives are employed as compared with the total number of employees, [and] whether the relative lives in the same household or is partially dependent on the shareholder.[7]

Typically, as in this case, the Board excludes employees who live with or are otherwise financially dependent on a relative who owns or actively manages the business, particularly where other owners of the business are related to each other and to the employee-relative whose status is at issue. See, *e.g.*, *Pandick Press Midwest, Inc.*, 251 N.L.R.B. 473, 473-474 (1980); *Parisoff Drive-In Market, Inc.*,

[6] See, *e.g.*, *Modern Mfg. Co.*, 261 N.L.R.B. 534, 551-552 (1982), enforced, 115 L.R.R.M. (BNA) 2360 (4th Cir. 1983); *Dunn Bros.*, 235 N.L.R.B. 1032, 1043 (1978), enforced, 87 Lab. Cas. (CCH) ¶ 11593 (4th Cir. 1979); *Marvin Withcrow Trucking*, 229 N.L.R.B. 412, 412-413 (1977). See also *Sertafim, Inc.*, 267 N.L.R.B. No. 114, JD 16 (1983); *Ellis Funeral Homes, Inc.*, 255 N.L.R.B. 891, 891-892 (1981); *Viele & Sons, Inc.*, 227 N.L.R.B. 1940, 1948 (1977); *Economy Cash Stores, Inc.*, 202 N.L.R.B. 930, 930-931 (1973).

[7] Subsequent judicial decisions have added the following factors to those listed in *Caravelle I* which the Board also applies: "'(1) the activity, if any, of the employee in the Union (2) the total number of employees as against the number of blood related employees and (3) the overall ties and social activities of the family involved.'" *Linn Gear Co.* v. *NLRB*, 608 F.2d 791, 794 (9th Cir. 1979); *NLRB* v. *H.M. Patterson & Son, Inc.*, 636 F.2d 1014, 1017 (5th Cir. 1981).

supra; Economy Cash Stores, Inc., supra; Viele & Sons, Inc., supra. Of course, whether the employee enjoys special job-related privileges, in addition to a family relationship with an owner or manager of the business, remains relevant to determining the unit inclusion issue. See, *e.g.*, *Wilkes-Barre Wholesale Service, Inc.*, 246 N.L.R.B. 491, 497 (1979); *Holthouse Furniture Corp.*, 242 N.L.R.B. 414, 415-416 (1979); *Wesco Electric Co.*, 232 N.L.R.B. 479, 483 (1977); *Groehn Spotting Fixtures Co.*, 224 N.L.R.B. 842, 842-844 (1976); *Modern Mfg. Co., supra.* Where application of the *Caravelle* criteria shows that an employee-relative is not aligned with management by virtue of the family relationship, the existence of a special job status is necessary to exclude the employee from the unit. See, *e.g.*, *Swanson-Nunn Electric Co.*, 256 N.L.R.B. 840, 847 (1981); *Toyota Midtown, Inc.*, 233 N.L.R.B. 797, 797 n.3 (1977); *American Chemical Corp.*, 215 N.L.R.B. 94, 94-95 (1974).[8]

The court of appeals' opinion, without even discussing the Board's authority under Section 9(b), requires the Board to make its unit determinations

[8] Thus, the Board excludes relatives of low-level managers with no ownership interest in the business only where special job status is shown. See, *e.g.*, *Purpas of Crescent City, Inc.*, 194 N.L.R.B. 616, 616 (1971) (wife of local manager with no ownership interest included); *Weyerhaeuser Co.*, 211 N.L.R.B. 1012, 1012-1013 (1974) (daughter of branch manager, no special privileges, included in the unit); *Novi American, Inc.-Atlanta*, 234 N.L.R.B. 421, 421-422 (1978) (son of regional manager excluded only on basis of special privileges); *Queen City Paving Co.*, 243 N.L.R.B. 71, 72 (1979) (son of general manager with no ownership interest included absent special job privileges); *T.L.C. Lines, Inc.*, 265 N.L.R.B. 1209, 1210 (1982), enforced, 717 F.2d 461 (8th Cir. 1983) (son of former manager included).

solely on the basis of whether the employee-relative receives any special job-related privileges. What that decision erroneously disregards is that the Board's practice of considering all facets of the "employer-employee" relationship—including close family ties—effectuates the important policy of the National Labor Relations Act of promoting effective collective bargaining by maintaining a distinct line between labor and management.

B. The Board's Policy of Excluding Close Family Members Fosters Efficient Collective Bargaining Relationships, Protects the Section 7 Rights of Employees and Maintains a Proper Line Between Management and Labor

1. The decision below, which restricts the Board's discretion to exclude employee-relatives from bargaining units to situations where the employees enjoy special job-related privileges, is fundamentally inconsistent with this Court's decisions upholding the Board's broad discretion under Section 9(b) to determine appropriate bargaining units. Under those decisions, Board unit determinations are rarely to be disturbed and must be sustained if they have a reasonable basis in law. See, *e.g.*, *South Prairie Construction Co.* v. *Operating Engineers*, 425 U.S. 800, 805 (1976); *Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 171 (1971); *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 491 (1947). Here, as in *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. at 190, "the NLRB's longstanding practice of excluding from bargaining units * * * [close relatives aligned with management], rooted firmly in the Board's understanding of the nature of the collective-bargaining process * * * fairly demonstrates that the Board's treatment of

[such employees] does indeed have 'a reasonable basis in law.'" Thus, the Board's order should have been sustained by the court of appeals.

The broad standard in Section 9(b) of the Act governing the Board's unit determinations requires that they further the Act's primary policies to promote "efficient collective bargaining" and protect the rights of employees to self-organization and freedom of choice. *Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. at 172; *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U.S. 146, 165 (1941). The Board's community of interest requirement as applied in the close family relationship situation, which groups employees sharing substantial mutual interests in a unit and excludes those employees whose interests are more closely identified with management, directly serves those fundamental policies in three important ways.* It assures the cohesiveness among employees necessary for effective collective bargaining; it protects the Section 7 right of employees "to bargain collectively through representatives of their own choosing[,]" free from undue influence by those aligned with management; and it protects employers and unions by ensuring that the deliberations and confidences of each are not disclosed to the other.

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*While differences in compensation, hours of work, skills and other job-related factors often are relevant to determining whether employees share a sufficient community of interest to be grouped in the same bargaining unit (see *Kalamazoo Paper Box Corp.*, 136 N.L.R.B. 134, 137 (1962)), contrary to respondent's contention (Br. in Opp. 4-5), these are not the only relevant factors. As we have shown, the Board has long held that a lack of community of interest can also be demonstrated by the fact that an employee is more closely allied with management than with his fellow employees, and that such alignment may flow from a close family relationship.

Chemical Workers v. *Pittsburgh Plate Glass Co.*, 404 U.S. at 172-173; see *NLRB* v. *Yeshiva University*, 444 U.S. 672, 694-695 (1980) (Brennan, J., dissenting).

2. Employees engaged in collective bargaining have a mutual interest in achieving access to their employer on matters of concern that they do not otherwise have as individuals. Relying upon its expertise in employment matters, the Board has concluded that certain employee-relatives, particularly those who reside with owners or active managers of the business, are very likely to "get a more attentive and sensitive ear to their day-to-day and long-range work concerns than would other employees. While this accessibility to management may not always result in easily identifiable special privileges or favorable working conditions, the fact that they have this peculiar access gives them a status and area of interest not shared by the rest of the employees." *Parisoff Drive-In Market, Inc.*, 201 N.L.R.B. at 814. Because such employee-relatives have an effective avenue of access to management, their perceived need for collective representation to provide such access differs substantially from that of other employees.

An employee-relative who is financially dependent on the owner, who in turn is financially dependent on the profitability of his company, is likely to be motivated by very different factors than other employees, not only in deciding whether to vote for a union, but in evaluating the proper course of the bargaining process (should a union representative be selected). Particularly where all of the owners are related to each other as well as to the employee, the business interests of the corporation are likely to be synonymous with the interests of the family. The

employee-relative's "interests as a member of the governing family may well outweigh his interests as an employee of the corporation and, to that extent his interests may be entirely different from the interests of the other employees whose sole stake in the corporation is that they work there." *Parisoff Drive-In Market, Inc.*, 201 N.L.R.B. at 814. Thus, allowing close relatives to be included in the same bargaining unit with other employees may result, not only in depriving those employees of representation by the bargaining agent of their choice, but, if an agent is selected, in creating such conflicts in the bargaining process that the effectiveness of the agent is impaired. See *Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. at 173.[10]

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[10] Contrary to respondent's contention (Br. in Opp. 8), the Board's practice of excluding relatives in certain circumstances does not violate the Act's requirement that the Board remain "wholly neutral" in union elections with respect to those who oppose as well as those who favor a union. Compare *NLRB* v. *Savair Mfg. Co.*, 414 U.S. 270, 278 (1973). *Savair* requires neutrality with respect to those employees otherwise eligible to vote in an election conducted in an appropriate unit; it has never been held to affect the Board's authority to exclude from a unit employees who do not share with other employees a community of interest in their relationship with the employer. *Caravelle II*, 504 F.2d at 1188. Indeed, whenever the Board excludes individuals from an appropriate bargaining unit, it necessarily precludes them from voting in the election for that unit without violating the principle of *Savair*. Although employees who lack a community of interest with others may well oppose a union when others favor it, particularly where the lack of commonality stems from an employee's family relationship with an owner of the business, the opposition is merely a consequence of the divergent interests; it is not the basis for the employee's exclusion from the unit.

Moreover, an employee who is closely related to the owner of a business is likely to be viewed with concern by other employees, and his "participation in union matters would necessarily be suspect and possibly divisive." *Purgas of Crescent City, Inc.*, 194 N.L.R.B. 616, 617 (1971) (Member Jenkins, dissenting); see *P.A. Mueller & Sons, Inc.*, 105 N.L.R.B. at 554. The presence of a close relative at union meetings, for example, "would, considering the likelihood of [his] conveying information to the Employer • • • inhibit adequate and accurate expression of views and freedom of action on the part of the membership; and even if it did not, communication of such internal matters could effectively undermine or impair the ability of the Union to achieve its legitimate goals" and to reach agreement with an employer. *Purgas of Crescent City, Inc.*, 194 N.L.R.B. at 617-618 (Member Jenkins, dissenting).

As the Board explained in *P.A. Mueller & Sons, Inc.*, 105 N.L.R.B. at 553-554:

> The inclusion of a close relative of the employer in a bargaining unit with the other employees in a particular plant may as effectively hinder the employees in organizing themselves and bargaining collectively as would the intrusion of any representative of management • • •.

The exclusion of close relatives of company owners or managers from a bargaining unit also protects management. Particularly where the employee-relative lives with the owner, the relative can reasonably be expected to be exposed to information about labor relations or even corporate profitability.[11] By

[11] In *Parisoff Drive-In Market, Inc.*, 201 N.L.R.B. at 814, the Board expressly compared such employee-relatives to confidential employees whom the Board historically has excluded from bargaining units generally at the request of employers. 201 N.L.R.B. at 814; see *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, *supra*. Indeed, in some cases it is the employer who seeks or agrees to the exclusion of employee-relatives from a bargaining unit. See, *e.g.*, *NLRB* v. *Warner*, 587 F.2d 896, 901 (8th Cir. 1978); *McMahon Transportation Co.*, 124 N.L.R.B. 1092, 1093 (1959).

excluding family members who have unusual access to the employer's confidential information, the Board avoids placing those individuals in a conflict-of-interest situation and makes it less likely that the union, in the event of a family squabble or a change in loyalties, would obtain from the employee-relative information or materials to which it ordinarily is not privy. The Board's practice of excluding some close relatives of company owners from bargaining units is thus consistent with the fundamental policy of the Act that "neither management nor labor should be forced to accept a potential fifth column into its ranks." *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 193 (1981) (Powell, J., concurring in part and dissenting in part).

3. These considerations underlying the Board's policy of excluding dependent family members are completely consistent with the intention of Congress in enacting the Taft-Hartley amendments of 1947 to assure that all individuals "allied with management" be excluded from collective bargaining in order to protect "the adversary system" contemplated by the Act. *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. at 193 (Powell, J., concurring in part and dissenting in part). Accord: *NLRB* v. *Yeshiva University*, 444 U.S. at 682; see *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 494-495 (1947) (Douglas, J., dissenting). Thus, Con-

gress amended Section 2(3) expressly to exclude supervisory employees from the Act's coverage, see *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. at 181-185, and also manifested its intent that managerial employees be excluded from the Act. *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 283-284 (1974).

Congress also considered and did not disturb the Board's longstanding practice of excluding from bargaining units under Section 9(b) employees who have access to confidential, labor relations information of their employer. *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. at 185. The Board's policy of excluding certain close relatives of company owners from bargaining units, which likewise was not disturbed by Congress, similarly attempts to preserve the practical, realistic line between management and labor which Congress intended to maintain under the Act.

C. The Decision Below Is Inconsistent With The Holdings Of All Other Courts Of Appeals On This Issue And Its Reliance On Section 2(3) To Restrict The Board's Discretion To Exclude Employees From Bargaining Units On The Basis Of Close Family Relationship Is Misplaced

The reasonableness under the National Labor Relations Act of the Board's multi-faceted criteria for excluding close family members from bargaining units has been recognized by every court of appeals that has considered the issue, except for the Sixth Circuit. Indeed, the original basis for the standards employed by the Board in these cases comes from the Seventh Circuit's decision in *Carouelle I*, *supra*.[10] In

[10] In *Carouelle Wood Products, Inc.*, 185 N.L.R.B. 800 (1970), the Board had relied upon the Section 2(3) definition

that case, the court of appeals affirmed the Board's traditional authority under Section 9(b) to exclude, based on a "case-by-case analysis," employees whose relationship with owners removes them from the community of interest shared by other employees. It held that the Board could do so, however, only after examining the various factors quoted previously (see page 14, *supra*), in order to determine whether the employee-relative objectively lacked a community of interest with other employees by virtue of the relationship (466 F.2d at 679).

On remand, the Board applied the criteria articulated by the court and excluded the spouses and children of key stockholders and officers of the corporation. 200 N.L.R.B. 855, 856 (1972). In enforcing the Board's supplemental decision, the Seventh Circuit emphasized that "none of the guidelines suggested by the court [in *Carouelle I*] is job-related." *NLRB* v.

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of "employee" in excluding from the unit the wives and children of several 10% owners of a closely held corporation. The Seventh Circuit rejected the Board's reliance on Section 2(3). In refusing to uphold the Board's expansion of the Section 2(3) exclusion to cover children or spouses of "'substantial' shareholders" of corporations, the court held that the Board's standard "has proved so elastic that it virtually repeals the statutory language." 466 F.2d at 678.

Following the court's decision in *Carouelle I*, the Board expressly limited the Section 2(3) exclusion as applied to corporations to the children or spouses of an individual with a minimum of 50% ownership interest. *Corsi Motor Sales, Inc.*, 201 N.L.R.B. 918 (1973). No issue concerning the validity of that Board position is presented in this case. Diane Sabo's spouse owns less than 50% of the corporation, and Mildred Sabo is the mother, not the child or spouse, of the owners (see page 27, *infra*). The Board's decision here, accordingly, is not based on any premise that Diane and Mildred Sabo are not "employees" within the meaning of Section 2(3).

Carouselle Wood Products, Inc. (*Carouselle II*), 504 F.2d 1181, 1186-1187 (7th Cir. 1974). The court thus reaffirmed the Board's longstanding authority "to exclude employees on the basis of family relationship—without regard to job-related factors—provided the factual finding implicitly required by the [*Carouselle I*] guidelines is made in each case" (*id.* at 1187).

Both the Ninth Circuit in *Linn Gear Co.* v. *NLRB*, 608 F.2d 791, 796 (1979), and the Fifth Circuit in *NLRB* v. *H. M. Patterson & Son, Inc.*, 636 F.2d 1014, 1017 (1981), recognizing the Board's broad discretion under Section 9(b) of the Act, have expressly upheld the Board's use of the "'community of interest' test" (636 F.2d at 1017; 608 F.2d at 796) to exclude an employee if he or she is more closely aligned with management than with other employees, regardless whether the reason is job-related or family-related or both.[13] These decisions stand in stark contrast to the decision below with respect to the scope of Board authority to make unit determinations under Section 9(b) and are clearly correct.

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[13] Contrary to respondent's contention (Br. in Opp. 4 n.2), no other court of appeals follows the Sixth Circuit's rule prohibiting exclusions from bargaining units under Section 9(b) on the basis of family relationship. Each of the cases cited by respondent merely approved a Board exclusion or inclusion based on job privileges, but none held that such a finding is required. See *NLRB* v. *Connecticut Foundry Co.*, 488 F.2d 971, 979 (2d Cir. 1962); *NLRB* v. *Warner*, 587 F.2d 896, 901-902 (8th Cir. 1978); *NLRB* v. *Jackson Farmers, Inc.*, 422 F.2d 1042, 1044-1045 (10th Cir. 1970), cert. denied, 401 U.S. 955 (1971). Moreover, the Second Circuit, in *Connecticut Foundry*, cited with approval the decisions in *Carouselle I* and *II*, and *Linn Gear Co.* (488 F.2d at 979); see also *Mercy Hospital* v. *NLRB*, 668 F.2d 661, 666 (2d Cir. 1982).

Although the court below acknowledged (Pet. App. 3a) the Board's longstanding authority to exclude from bargaining units employees whose interests are "allied • • • with those of management[,]" the court relied on its earlier decision in *NLRB* v. *Sexton*, *supra*, in concluding that the family exclusion in Section 2(3) of the Act precludes the Board from excluding employees under Section 9(b) on the basis of family relationship." But the court's reasoning is not a valid ground for limiting the Board's Section 9(b) authority to determine "the unit appropriate for the purposes of collective bargaining."

Section 2(3) defines "employees" who are entitled to the basic protections of the Act. When an individual is excluded under Section 2(3), he is wholly outside the ambit of the statute. Thus, an "individual employed by his parent or spouse" within the meaning of Section 2(3) is denied all protection under Section 7 of the Act; he may, for example, be discharged for union activity. See *Campbell-Harris Electric, Inc.*, 263 N.L.R.B. 1143, 1143-1144, enforced, 719 F.2d 292 (8th Cir. 1983). But simply because an individual is an "employee," notwithstanding a family tie to the employer, and therefore is protected by Section 7, is not determinative of whether the individual should properly be included in a bargaining unit—as the court below itself implicitly recognizes by permitting such persons to be excluded if

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[14] In decisions following *Sexton*, the Sixth Circuit approved the exclusion of family members from bargaining units only where special job-related privileges were shown to exist. See *Cherrin Corp.* v. *NLRB*, 349 F.2d 1001, 1004-1007 (1965), cert. denied, 382 U.S. 981 (1966); *Ueda* v. *Brooks*, 365 F.2d 326, 329 (1966); see also *NLRB* v. *Hubbard Co.*, 702 F.2d 634, 636-637 (1983).

they enjoy job-related privileges (see note 14, *supra*). This Court recognized as much in *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. at 178, where it held that, "in fulfilling its statutory obligation to determine appropriate bargaining units under § 9 of the Act, 29 U.S.C. § 159, for which broad discretion has been vested in the Board," the Board, for policy reasons, properly has excluded from bargaining units employees otherwise protected by Section 7 who have access to confidential, labor relations information. The court of appeals' reliance on Section 2(3) as an implied restriction on Section 9(b) is thus wholly misplaced.[18]

D. The Board Properly Determined That The Two Employees At Issue Should Be Excluded From The Bargaining Unit Based On Their Close Family Ties To Respondent's Owner-Managers

As we have shown, the Board's decision whether to exclude a family member from a bargaining unit

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[18] Nothing in the legislative history of Section 2(3) indicates that Congress intended that Section to preclude the Board from exercising its otherwise broad authority under Section 9(b) to exclude from appropriate bargaining units, for policy reasons, employee-relatives not within the Section 2(3) exclusion. The Senate Report on the bill that became the Wagner Act states only (S. Rep. 573, 74th Cong., 1st Sess. 7 (1935)):

> For administrative reasons, the committee deemed it wise not to include under the bill agricultural laborers, persons in domestic service of any family or person in his home, or any individual employed by his parent or spouse.

The House Report merely states that the definitions in Section 2, 29 U.S.C. 152 "are for the most part self-explanatory." H.R. Rep. 972, 74th Cong., 1st Sess. 8 (1935).

is based on a number of factors: the percentage of stock held by the owner; whether co-owners are related to one another; whether the owner is active in management; the number of relatives compared with the total number of employees; and whether the employed relatives live in the same household with or are partially dependent on the owner. *Caruselle I*, 466 F.2d at 679; *Parisoff Drive-In Market, Inc.*, 201 N.L.R.B. at 814 & n.2. There can be no doubt that the Board reasonably applied those standards to exclude both employees at issue here.

Diane Sabo is the wife of respondent's president, and Mildred Sabo is the mother of all three owners. Diane lives with her husband and Mildred lives with one of the sons. Each of the owners owns one-third of the business; all are related and all are active in formulating policy and running the business. In addition to living with a substantial owner of the business, Diane Sabo works at the same office with her husband, eats lunch with him and takes her breaks in his office, and Mildred Sabo has daily contact with her sons.

Under these circumstances, the Board reasonably concluded that both Diane and Mildred Sabo enjoy an access to management not shared by other employees, and that their financial interests are more likely to be identified with the Sabo family as owner of the corporation than with their fellow employees. Their participation in union affairs would likely be viewed with suspicion by the other employees, and could chill the exercise of the rights of unit employees freely to engage in the bargaining process. In addition, given their close and frequent contact with the owners, their inclusion in the bargaining units would create a risk to both the union and respondent that

privileged information would not be secure, thereby compromising both parties' ability to bargain. The Board therefore properly excluded them from the bargaining units on the basis of the circumstances surrounding their family relationship with the owners.[14] *Parisoff Drive-In Market, Inc., supra; Economy Cash Stores, Inc., supra; Viele & Sons, Inc., supra.*

---

[14] Indeed, although no longer an issue in this case, the Board was warranted in finding that Diane Sabo should be excluded from the unit for the additional reason that she enjoyed special job-related privileges, viz., "her irregular work schedule, her breaks and lunches with corporate officers in corporate offices, her being paid a salary rather than hourly pay, and not being required to punch a time clock" (Pet. App. 21a-22a n.2).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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RESPONDENT'S

BRIEF

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1984

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

ACTION AUTOMOTIVE, INC.,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR ACTION AUTOMOTIVE, INC.

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QUESTION PRESENTED

WHETHER THE NATIONAL LABOR RELATIONS BOARD HAS AUTHORITY THROUGH ITS APPLICATION OF SECTION 9(b) OF THE NATIONAL LABOR RELATIONS ACT, 29 U.S.C. 159(b), TO AMEND SECTION 2(3) OF THE ACT, 29 U.S.C. 152(3), WITHOUT CONGRESSIONAL MANDATE, BY EXCLUDING EMPLOYEE-RELATIVES OF OWNERS OF A CLOSELY HELD CORPORATION, IN THE ABSENCE OF EVIDENCE THAT SAID RELATIVES RECEIVE ANY JOB-RELATED PRIVILEGES.

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No. 83-1416

IN THE

Supreme Court of the United States

October Term, 1984

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
ACTION AUTOMOTIVE, INC.,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR ACTION AUTOMOTIVE, INC.

STATEMENT

Action Automotive, Inc., herein called Respondent, does not take issue with the description of the Opinions Below, Jurisdiction and Statute Involved contained in the Brief for the National Labor Relations Board (hereinafter the "Board"). However, the Board's Statement is unacceptable since it is incomplete and at times inaccurate. A description of defects and an attempt to cure them follows.

Respondent is a closely held Michigan corporation engaged in servicing the automotive after-market. It operates retail automotive parts and gasoline outlets in various Michigan cities and a warehouse facility situated in Flint, Michigan. (Pet. App. 2a).

Richard, James and Robert Sabo are brothers. Each own a one-third interest in Respondent, with Richard serving as President, Robert as Vice-President and James as Secretary-Treasurer. (J.A. 9, 10). Each is active in day-to-day operations via the formulation and promulgation of wage, benefit and personnel policies. However, once policies are determined, local store and warehouse supervision is fully vested with authority for carrying out said policies and for day-to-day personnel decisions relative to all employees, including Mildred and Diane Sabo. (J.A. 31, 32).

The Retail Store Employees Union, Local 40 (the Union) filed a petition with the Board requesting that a representation election be held among Respondent's employees. (Pet. App. 24a). The Board conducted elections in two bargaining units — a unit of store and warehouse employees at Respondent's nine retail stores (Unit A) and a unit of office clerical employees at the headquarters office (Unit B). No Board certifications then issued as determinative challenges existed. The vote in Unit A was 20-18 with one challenged ballot — Mildred Sabo's. The vote in Unit B was 4-3 with five challenged ballots, including that of Diane Sabo.

Following a formal hearing, a Board Hearing Officer recommended exclusion of both Diane Sabo and Mildred Sabo from their respective units solely because of their family relationship with the Sabo brothers. (Pet. App. 29a-33a, 33a-37a). In fact, the Hearing Officer specifically found that neither Diane nor Mildred Sabo enjoyed any special job-related privileges. (Pet. App. 31a, 35a).

MILDRED SABO

Mildred Sabo is the mother of Richard, Robert and James Sabo. (J.A. 9, 10). As found by the Board Hearing Officer, while Mildred Sabo resides with James Sabo, she does assume financial obligations and responsibilities. Her independence is exhibited by the fact she provides all groceries, owns the furniture, is responsible for housekeeping functions and pays the maintenance costs relative to the household. (J.A. 60, 61; Pet. App. 33a).

Mildred Sabo has been employed as a full-time cashier at a retail outlet for approximately eleven (11) years. The Board concedes she is one of Respondent's most experienced cashiers. (Board Brief – Page 4).

Mildred Sabo works subject to common local supervision with other store employees and pursuant to a schedule determined by said local supervision. She performs identical work functions engaged in by other store cashiers, and is subject to the work rules governing all store employees. (J.A. 58-62). Mildred is hourly rated and receives overtime pay. She qualifies for the identical fringe benefits and commissions afforded all other store employees. (J.A. 28, 56, 57).

While Mildred does not punch a time clock, it is undisputed that such procedure is a carryover from prior practice when time clocks did not exist at the Respondent's predecessor company (Acme Auto Stores), wherein Mildred commenced her employment. (J.A. 19-21, 30, 57). Moreover, Mildred's actual work time is verified by local store supervision. Additionally, two employees deemed eligible to vote (Fred Britton and John Sturgis) do not punch time clocks. (J.A. 21).

It is undisputed that Mildred Sabo does not enjoy any special privileges or status. In this regard, the Board Hearing Officer specifically found "insufficient evidence

exists to establish that Mildred Sabo receives special privileges due to her relationship to the three owners of Action Automotive." (emphasis added) (Pet. App. 35a). As noted by the Board herein, the Hearing Officer's exclusion of Mildred rested solely on the basis that "in view of her relationship" with her three sons, "Mildred Sabo's interests are more closely aligned with management than with [Respondent's] employees". (Pet. App. 36a).

The Board adopted the Hearing Officer's findings and recommendations relative to Mildred Sabo, including the conclusion that Mildred does not enjoy special privileges or status as an employee.

DIANE SABO

Diane Sabo is the wife of and resides with Richard Sabo, a one-third owner and President of Respondent. She owns no stock; nor is she an officer. (J.A. 9, 10, 19).

Diane Sabo has been employed by Respondent and its predecessor company, (Acme), for approximately eleven (11) years. (J.A. 26). She is a general ledger clerk which is undisputedly an office clerical function. (J.A. 19, 29).

Diane Sabo is directly supervised by the same individual who supervises all other office employees. (J.A. 27, 29). At no time has immediate supervision been instructed to treat Diane differently from any other clerical employee. (J.A. 27). As is the case with all clericals, immediate supervision solely determines Diane's work schedule. (J.A. 27). Diane Sabo is regularly scheduled in the office on at least Tuesdays and Thursdays pursuant to a weekly-posted work schedule. (J.A. 12, 32). She is stationed in the same work area as all other clericals, which work area is separated from Respondent's administrative offices. (J.A. 8, 29).

Although Diane's hours may vary from week to week, such is due to the schedule determined by immediate supervision, which scheduling is done to suit the needs of Respondent. (Pet. App. 36a; J.A. 23, 27). However, regardless of variance, Diane is expected to and does work between 20-25 hours each week. (J.A. 20). Another eligible clerical employee's work time fluctuates between 37-45 hours weekly with such scheduling likewise accomplished by local supervision on a need basis. (J.A. 43). Like other employees, Diane will on occasion perform her clerical functions at home. (J.A. 14, 18, 19). At times, Diane Sabo is permitted to leave work early to accomplish family needs. However, other eligible clerical employees also leave early for various reasons including such family needs as doctor appointments, babysitting constraints, health problems of children, etc. In fact, special accommodations are made for virtually all office clerical employees. (J.A. 11, 15, 16). In sum, Diane receives no accommodation relative to a so-called "irregular work schedule" not afforded others.

Diane Sabo is paid one hundred dollars ($100.00) for her 20-25 hour work week. (J.A. 23). This equates to between $4-$5 per hour, which is less than the rate paid one other clerical employee ($5.90) and at its highest rate ($5.00), is equal to rates paid others. (J.A. 28, 29). Further, like all other clerical employees, Diane Sabo is not paid when she does not work or if she misses work time. While Diane can make up lost time, the same is true for all eligible clerical employees. (J.A. 20, 28).

While Diane Sabo is currently the only part-time clerical employee, it is clear Respondent has utilized other part-time employees in the past. (J.A. 12, 14). Further, Diane Sabo receives the same fringe benefits afforded any other part-time employees. (J.A. 28). While Diane Sabo does not punch a time card, such is merely a carryover from the prior business (Acme) at which time clocks were not used. In any event, all time must be and is verified

solely by immediate supervision. (J.A. 20, 29). Another eligible clerical employee (John Sturgis) also does not punch a time clock. (J.A. 21).

Contrary to the Board's assertion at page 3 of its Brief, Diane Sabo regularly eats lunch with the other clericals in the facility's dining area. (J.A. 51). Only on occasion does Diane lunch with Richard and/or Robert Sabo. It is uncontroverted that the lunch period is unpaid time. (J.A. 12, 51).

Diane Sabo works in accord with a posted schedule (J.A. 12, 52). This schedule, contrary to the Board's assertion at page 4 of its Brief, does control her break periods. (J.A. 52). Although Diane Sabo on occasion spends break time in Richard Sabo's office, the record testimony is, at best, to the effect that during breaks Diane Sabo would "sometimes sit in the lunchroom, sometimes she would go into Dick's [Sabo] office." (J.A. 51).

BOARD HEARING OFFICER'S FINDINGS

The Board Hearing Officer specifically concluded that Diane Sabo does not enjoy any special work-related privileges. He nevertheless held that she "has a community of interest separate from that of the office clerical employees" and, therefore, recommended that the challenge to her ballot be sustained solely on the basis of familial relationship. (Pet. App. 33a).

BOARD FINDINGS

The Board, while adopting the Hearing Officer's findings and recommendations relative to Diane Sabo, additionally noted she should be excluded from the unit not only because of her relationship to Respondent's owners, but also because she enjoyed special job-related privileges, viz., "her irregular work schedule, her breaks and lunches with corporate officers in corporate offices,

her being paid a salary rather than hourly pay, and not being required to punch a time clock." (Pet. App. 21a-22a n.2).

The Board certified the Union as the exclusive representative in Unit A, and directed the Regional Director to count two of the other challenged ballots in Unit B, which resulted in a tally of 5-4 for the Union and the union's certification in that unit as well. (Pet. App. 15a, 22a; J.A. 3-4).

In order to secure court review, Respondent then refused to bargain with the Union, contending that the Board certifications were invalid.

COURT OF APPEALS' FINDINGS

The court of appeals denied enforcement of the Board's order to bargain. (Pet. App. 1a-5a). The court held the Board has no authority under Section 9(b) of the Act, 29 U.S.C. 159(b), to exclude employees from bargaining units solely because of a close family relationship with their employer. The court explicitly *rejected* an expanded "community of interest" standard. Instead, the court concluded that "familial ties can only be considered as evidence of a special status when the employee receive[s] job-related benefits or other favorable working conditions which flow from the relationship." (Pet. App. 3a).

Applying this standard to the two employees at issue, the court of appeals found that "[t]he only factor of Mildred's special status is her family ties to the Company • • • [and] such family ties alone are insufficient to establish 'special status'" (Pet. App. 5a). With regard to Diane Sabo, the court found that her "work schedule differed significantly from that of her fellow employees," but correctly concluded that such a "single instance of a special treatment is insufficient evidence of a 'special status'" to support the Board's order. (Pet. App. 4a-5a).

SUMMARY OF ARGUMENT

A.

The court below followed its longstanding rule which requires sufficient evidence of job-related privileges before employee-relatives of owners or managers can be excluded from bargaining units. The only issue before this Court is the validity of the above rule. In this regard, the Board acknowledges at page 28, footnote 16 of its brief that the Board's finding of special status relative to Diane Sabo, which finding was rejected by the court below, is *not* an issue herein.

B.

The Board has failed to maintain a consistent, longstanding rule in regard to the unit placement of employee-relatives of owners and managers. In its early cases, the Board employed community of interest terminology to exclude relatives of owners and managers merely on the basis of their familial relationships. In *International Metal Products Co.*, 107 N.L.R.B. 65 (1953), the Board reexamined this policy, concluded that it resulted in unit determinations based on irrebutable conclusions rather than true community of interest analysis and developed the "special status" test. During the ensuing fourteen years, the Board, with the approval of the courts, inquired into the working conditions of relatives in order to determine if they enjoyed a "special status" that required their exclusion from the bargaining unit. In *Foam Rubber City #2 of Florida, Inc.*, 167 N.L.R.B. 623 (1967), the Board again reversed course, overruling *International Metal Products Co.*, and its progeny. The Board purported to again adhere to its "community of interest" test. Since *Foam Rubber City #2*, the Board has employed both the "special status" test and the so-called "community of interest" test without clearly indicating the reason

for choosing one test over the other. In fact, the Board has even cited *International Metal Products Co.* with approval since *Foam Rubber City #2*. This confused body of law stands in stark contrast to the consistent and longstanding interpretations of the Act by the Board to which this Court has deferred in the past. See, e.g., *N.L.R.B.* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 102 S.Ct. 216, 228 (1981) and *N.L.R.B.* v. *Bell Aerospace*, 416 U.S. 267, 275, 445 S.Ct. 1157, 1762, 40 L.Ed.2d 134 (1974). Accordingly, the Board's current position is not entitled to any weight and, therefore, does not justify reversal of the court below.

C.

Under Section 2(3) of the Act, 29 U.S.C. 152(3), individuals employed by their parents or spouse are excluded from coverage of the Act and, consequently, from bargaining units solely on the basis of their family ties. Congress could have so excluded other relatives. It chose not to. This decision reflects Congressional intent *not* to so exclude other relatives. The Board's attempt to exclude other relatives constitutes an unauthorized amendment of the Act.

The Board concedes the relatives in dispute, Diane and Mildred Sabo, do not fall within the exclusion of Section 2(3). See page 23, footnote 12 of the Board's Brief. Nevertheless, the Board contends they should be excluded pursuant to the Board's unit determination power under Section 9(b) of the Act, 29 U.S.C. 159(b). As the courts of appeal have repeatedly recognized, the Board cannot use Section 9(b) to effectuate a result which is inconsistent with the Congressional intent expressed in Section 2(3). See *N.L.R.B.* v. *Sexton*, 203 F.2d 940 (6th Cir. 1953); *Lake City Foundry* v. *N.L.R.B.*, 432 F.2d 1162, 1169 (7th Cir. 1970) and *N.L.R.B.* v. *Caravelle Wood Products, Inc.*, 466 F.2d 675, 678 (7th Cir. 1972).

D.

The Board advances the position that it possesses authority to exclude employee-relatives of owners from bargaining units without showing said relatives receive special job-related privileges or benefits. In so doing, the Board relies on the decisions of the Seventh Circuit in *N.L.R.B.* v. *Caravelle Wood Products, Inc.*, 466 F.2d 575 (1972) (*Caravelle I*) and *N.L.R.B.* v. *Caravelle Wood Products, Inc.*, 504 F.2d 1181 (1974) (*Caravelle II*). In *Caravelle II*, 504 F.2d at 1187, the Seventh Circuit acknowledged that *Caravelle I* fashioned an "expanded community of interest" standard because it authorized unit placement decisions on the basis of family relationship without regard to job-related factors.

The failure of the Board to employ the "expanded community of interest" terminology in either its Brief or its post-*Caravelle I* decisions is indicative of the fact that there is no basis in the Act or case law thereunder for expanding community of interest beyond terms and conditions of employment. On the contrary, the Board and the courts have consistently used job-related criteria to define community of interest.

The Board argues that the employees in dispute are aligned with management simply because of their family ties. Alignment with management is a recognized element of community of interest. However, like all elements of community of interest it must be established through terms and conditions of employment. See *International Metal Products Co.*, *supra*, and *N.L.R.B.* v. *Yeshiva University*, 444 U.S. 672, 100 S.Ct. 856, 864, 63 L.Ed.2d 115 (1980). The Board cannot circumvent this requirement simply by substituting the term "alignment with management" for required objective facts.

E.

As its alignment with management argument reveals, the Board, when not anchored to the facts by the special status test, substitutes irrebutable conclusion, presumption and conclusory rationale for facts. Congress and this Court have condemned this practice. See, e.g. *N.L.R.B.* v. *Yeshiva University*, *supra*; *N.L.R.B.* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 102 S.Ct. 216, 222-224 (1981). The Sixth Circuit test, on the other hand, requiring *evidence* of special job-related privileges and/or benefits, results in decisions which are "rationally based on articulated facts and consistent with the Act." *N.L.R.B.* v. *Yeshiva University*, 444 U.S. at 691.

F.

In *Caravelle II*, 504 F.2d at 1189, Justice Stevens, while sitting as a Circuit Judge, expressed the fear that the expanded community of interest standard fashioned in *Caravelle I* would probably not "be identifiable by any standard other than probable opposition to the union at election time — which is obviously an impermissible standard under *Sanair* [414 U.S. 270, 278, 94 S.Ct. 495]." The legislative history of the Taft-Hartley Act also demonstrates that the "statute is 'wholly neutral' in requiring respect for those who oppose a union as well as those who favor one." *Id.* The post-*Caravelle II* decisions of the Board and the courts as well as the Board's statements to this Court reveal that Justice Stevens' fear has materialized. These developments are not surprising since, as the analysis above demonstrates, the Board can easily effectuate a probable opposition to the union standard under the guise of an expanded community of interest or a non-job based alignment with management standard. These standards, in fact, invite the abuse of discretion Justice Stevens feared since they do need to be

based on record evidence. In contrast, the special status standard requires evidence of special job-related privileges or benefits and, therefore, cannot be manipulated to achieve a result which is contrary to the neutrality requirements of the Act.

C.

The Board contends that its interpretation of Section 9(b) should be adopted since it prevents a union from being infiltrated by those whom it does not trust and who would convey confidential information to management. Unions do not need such protection. They already possess the power under Section 8(b)(1)(A) of the Act, 29 U.S.C. 158(b)(1)(A), to define their own criteria for membership and, therefore, to exclude those they do not trust.

II.

Under the Board's interpretation of Section 9(b), employee-relatives may be excluded from a bargaining unit by the Board even though they perform the same work under the same terms and conditions of employment as the rest of the employees in the bargaining unit. Such Board action places the employee-relatives' jobs in jeopardy since, upon winning the election, the union would demand that only bargaining unit members perform the work engaged in by the employee-relatives. Since such a demand is a mandatory subject of bargaining, it could be coupled with a strike threat forcing the employer to concede to the demand. Thus, employee-relatives, such as Diane and Mildred Sabo, would not only be disenfranchised but could be deprived of their livelihoods even though they enjoy no special privileges or benefits at the work place. There is no basis in the statute or its legislative history for an interpretation of Section 9(b) which produces these harsh results. Consequently, they should be avoided by rejecting the Board's interpretation and adopting the analysis of the court below.

I.

The Board argues, in essence, that Diane and Mildred Sabo should be excluded from the bargaining units because of their presumed propensity, due to their family ties, to refrain from engaging in concerted activity. The Board, consequently, advocates the investigation of employees' personal lives, motivations and beliefs in order to determine whether they are likely to engage in concerted activity. Such investigations are contrary to the mandate of Section 7 of the Act, 29 U.S.C. 157, which guarantees all employees the absolute right to join or assist labor organizations *or to refrain from any or all such activities*. Further, such investigations will mire the Board in endless proceedings and disputes as to personal facts and attitudes and the propensity to engage in concerted activity which can be discerned therefrom. The pursuit of such unit determination proceedings should not be encouraged.

ARGUMENT

The sole issue before the Court is the validity of the Sixth Circuit's "special status" rule, which requires evidence that employee-relatives of owners or managers enjoy special job-related privileges or benefits before they can be excluded from bargaining units.[1] The Board acknowledges that whether the employees herein actually enjoy a "special status" is not an issue before this Court. See page 20, footnote 16 of the Board's Brief.

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[1] The Second, Eighth and Tenth Circuits have also approved Board inclusion or exclusion of relatives based on evidence of special

(continued on following page)

I.

SINCE THE BOARD HAS FAILED TO MAINTAIN A CONSISTENT, LONGSTANDING RULE IN REGARD TO THE UNIT PLACEMENT OF EMPLOYEE-RELATIVES OF OWNERS AND MANAGERS, ITS CURRENT POSITION IS NOT ENTITLED TO ANY WEIGHT.

Contrary to the Board's assertions, it has failed to maintain a consistent, longstanding rule in regard to the unit placement of employee-relatives of owners and managers. In truth, the Board has over the years chartered a checkered path on this issue. Consequently, its current position is not entitled to deference.

In early cases, the Board excluded relatives of owners and managers from bargaining units, finding they lacked a community of interest with unit employees merely because of their family ties. See, e.g., *Louis Weinberg Associates, Inc.*, 13 N.L.R.B. 66 (1939) and *P. A. Mueller and Sons, Inc.*, 105 N.L.R.B. 552 (1953).

That policy was maintained until the Sixth Circuit in *N.L.R.B. v. Sexton*, 203 F.2d 940 (1953) held that since Section 2(3) specifically excluded individuals employed by their parent or spouse, the Board could not, by virtue of Section 9 of the Act, exclude other relatives solely on the basis of their familial relationships.

In *International Metal Products Co.*, 107 N.L.R.B. 65, 66-67 (1953) the Board examined its pre-*Sexton* application of the Act:

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job-related privileges or benefits. See *N.L.R.B. v. Connecticut Foundry*, 688 F.2d 877, 879 (2nd Cir. 1982); *N.L.R.B. v. Warner*, 587 F.2d 896, 902 (8th Cir. 1978) and *N.L.R.B. v. Jackson Farmer, Inc.*, 432 F.2d 1062 (10th Cir. 1970) cert. den. 401 U.S. 955 (1971). Contrary to the innuendo expressed by the Board in footnote 13 at page 24 of its Brief, none of the above circuits have affirmed the Board's exclusion of relatives solely on the basis of family ties.

> The Board has, over a period of years, evolved a policy of excluding from bargaining units certain relatives of management in addition to those specifically excepted under the definition of "employee" in Section 2(3) of the Act. This policy, having its authority in the Board's discretionary powers in determining the appropriate unit under Section 9(b), developed from a determination that certain close relatives of management lacked a sufficient community of interest with other employees in the bargaining unit to warrant their inclusion therein. However, it appears that what was originally an evaluation and weighing of interests, wherein recognition was given to ties created by family kinship, became under this policy an irrebutable conclusion that the mere existence of such a relationship within a given area negated the possibility of the existence of any community of interest.

In response to the experience described above and the instructions of the Sixth Circuit in *Sexton*, the Board fashioned the "special status" test:

> Reexamination of this policy leads us to the conclusion that its automatic application does not warrant continuation. We are convinced that the mere coincidence of a family relationship between an employee and his employer does not negate the mutuality of employment interest which an individual shares with fellow employees, absent evidence that because of such relationship he enjoys a special status which allies his interests with those of management.

Id. at 67.

During the next fourteen years, the Board, with the approval of courts, inquired into the working conditions

of relatives of owners and managers to determine whether a "special status" mandating exclusion from the bargaining unit existed. During this period, exclusions based on special status were limited to relatives and managers who enjoyed job-related benefits or privileges. For example, in *American Steel Buck Corp.*, 107 N.L.R.B. 554 (1953), a general manager's nephew who heard employee grievances was held to enjoy special status and was excluded from the unit. Similarly, the daughter of the secretary/twenty per cent stockholder and niece of all of the other officers and owners of a corporation who was not reprimanded for tardiness, and for whom no record was kept of absence for illness, was held to enjoy special status and was properly excluded. *Cherrin Corp. v. N.L.R.B.*, 349 F.2d 1001 (6th Cir. 1965), *cert. den.*, 382 U.S. 981, 86 S.Ct. 557, 15 L.Ed.2d 471 (1966)[5]

In *Foam Rubber City #2 of Florida, Inc.*, 167 N.L.R.B. 623 (1967), the Board again reversed course, overruling *International Metal Products Co.*, supra, as well as the above-cited progeny. The Board purported to again adhere to its "community of interest" test.

Since *Foam Rubber City #2 of Florida, Inc.*, supra, the Board has employed both the "special status" and the so-called "community of interest" test without clearly indicating the reason for choosing one test over the other. Thus, contrary to the Board's assertions at pages 10-16 of its Brief, the Board has not generally or typically excluded relatives of owners and managers solely on the basis of their family ties. Although the Board has, on occasion, excluded such relatives under the guise of its purported

[5] *See also* KERO Radio-TV, 116 N.L.R.B. 194 (1956); *Gordon Super Market*, 140 N.L.R.B. 583 (1964); *Payless Stores*, 150 N.L.R.B. 518 (1964); *Big Bee Dept. Stores, Inc.*, 160 N.L.R.B. 1925 (1966); *Ugalde v. Brooks*, 365 F.2d 326 (6th Cir. 1966); *Udico Manufacturing Co.*, 164 N.L.R.B. 700 (1967); *N.L.R.B. v. Jackson Farmer, Inc.*, 432 F.2d 1062 (10th Cir. 1970), *cert. den.*, 401 U.S. 955, 91 S.Ct. 974, 28 L.Ed.2d 238 (1971).

"community of interest" test[6], it has, nevertheless, continued to utilize the "special status" test it developed in *International Metal Products Co.*, supra, and supposedly overruled in *Foam Rubber City #2 of Florida, Inc.*, supra.[6] In

[6] *See Parisoff Drive-In Market, Inc.*, 201 N.L.R.B. 933 (1973); *Economy Cash Stores, Inc.*, 202 N.L.R.B. 930 (1973); *Federal Prescription Service, Inc.*, 203 N.L.R.B. 975, 977 (1973); *Save-U Stores, Inc.*, 225 N.L.R.B. 37, 57 (1976); *Vido & Sons, Inc.*, 227 N.L.R.B. 1940, 1948 (1977); *Marcus Wilderness Trucking*, 229 N.L.R.B. 412 (1977); *Dawn Bros., Inc.*, 235 N.L.R.B. 1032, 1043, *enf'd.*, 97 LC Cases ¶ 11,593 (6th Cir. 1979); *Ellis Funeral Homes, Inc.*, 255 N.L.R.B. 891 (1981).

[6] *See, e.g.*, the following cases where relatives were included in the bargaining unit because there was insufficient evidence of job-related privileges or benefits to establish that they enjoyed a special status at the work place: *Buckeye Village Market, Inc.*, 175 N.L.R.B. 271, 274 (1969) (sons of the secretary, of the Board of Directors and of the store manager/part owner); *Pargas of Crescent City, Inc.*, 194 N.L.R.B. 616 (1971) (wife of manager); *Fresno AG Hardware*, 189 N.L.R.B. 412, 413-414 (1970) (nephews of the owners); *Weyerhaeuser Co.*, 211 N.L.R.B. 1032 (1974) (17 year old daughter of the branch manager, who lived at home, and worked a varied schedule to accommodate her high school schedule); *American Chemical Corp.*, 213 N.L.R.B. 94 (1974) (sister of the president/minority stockholder, who lived in an adjacent house and rode to work with her brother); *Tape Club, Inc.*, 220 N.L.R.B. 928, 929 (1975) (two grandsons of president and sons of assistant executive director responsible for day-to-day operations, one of whom lived with his parents); *Supermarket of Chesilhurst, Inc.*, 170 N.L.R.B. 206, 207 (1968) (the sister of the employer's president/majority stockholder and daughter of the manager); *Bingold Co.*, 210 N.L.R.B. 286, 298 (1974) (19 year old son of the supervisor of the engineering and assembly operations, who lived with his parents); *Moore Mill & Lumber Co.*, 212 N.L.R.B. 264, 269 (1974) (niece and sister-in-law of owners); *San Diego Hotel Bank*, 219 N.L.R.B. 116, 119 (1975) (son of an assistant administrator); *John Warner Allen Dyer Carriage*, 227 N.L.R.B. 1757, 1761 (1977), *enf'd.*, 587 F.2d 854 (6th Cir. 1978) (brother of the owner); *Wilkes Pardo, Inc.*, 237 N.L.R.B. 1233 (1978), *enf'd. on other grounds*, 595 F.2d 451 (6th Cir. 1979) (son of one-sixth owner and grandson of one-third owner); *Topeka Maintenance, Inc.*, 233 N.L.R.B. 797 (1977) (son of the manager/corporate vice president/minority shareholder of closely held corporation); *Queen City Paving Co.*, 243 N.L.R.B. 71, 72 (1979) (student-son of the vice president and general manager); *Air Express International Corp.*, 242 N.L.R.B. 479, 504 (1979) (stepson of the district manager); *Pafco v. Kontogeorge*, 246 N.L.R.B. 567, 578 (1979) (son of a 49% owner whose uncle owned the remainder of the stock and was president

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fact, since its decision in *Foam Rubber City #2*, the Board has cited *International Metal Products Co.*, supra, with approval. See *Fergus of Crescent City, Inc.*, supra; *Fresno AG Hardware*, supra; *Wagenhauser Co.*, supra; *American Chemical Corp.*, supra; and *Toys Club, Inc.*, supra.

This confused body of law stands in stark contrast to the consistent and longstanding interpretations of the Act by the Board to which this Court has deferred in the past. See, e.g., *N.L.R.B. v. Hendricks County Rural Electric Membership Corp.*, 454 U.S 170, 102 S.Ct. 216, 228 (1981)

(continued from preceding page)

and whose sister was assistant manager and cousin was kitchen manager); *Hotels of San Diego*, 254 N.L.R.B. 1248, 1265-1266 (1981) (16 year old son of the service department manager who lived with his parents and arranged his schedule to fit his high school schedule); and *T.I.C. Lines, Inc.*, 265 N.L.R.B. 1200, 1210 (1982), *enf'd.*, 114 L.R.R.M. 2630 (6th Cir. 1983) (son of a former shop manager and consultant to the president).

The Board's use of the special status test has also resulted in the exclusion of relatives from bargaining units. See, e.g., *Atlantic Steamers Supply Co., Inc.*, 180 N.L.R.B. 382, 385 (1970) (nephew of the Secretary-Treasurer earned $30.00 per week more than appropriate for his job); *Federal Prescription Service, Inc.*, 203 N.L.R.B. 449, 467 (1973) (son-in-law of the vice president/part owner was salaried and was otherwise favored); *Superior Casting Co.*, 230 N.L.R.B. 1179, 1189 (1977) (stepdaughter of the president was allowed to arrange her own hours at work, to wash her laundry in her employer's apartment house above the plant during work); *Nixon Electrical Co.*, 232 N.L.R.B. 479, 483 (1977) (principal stockholder's mother arranged her own hours, was paid for 40 hours of work even though she worked less and took two hour lunches); *Mid America Machinery Co.*, 238 N.L.R.B. 537, 544 (1978) (president's father had no set hours and worked part time); *Carlton Harbor*, 243 N.L.R.B. 837, 843 (1979) (nephew of the president received a salary instead of hourly wages, set his own discharge interviews, was to be trained as to all functions of the operation, was not subject to layoff or discharge); *Miller-Davis Wholesale Service, Inc.*, 246 N.L.R.B. 495, 497 (1979) (president's [illegible] brother was paid about 50% more than the next highest paid warehouseman, took long lunches, and required his accessibility at work); *Industry Products Co.*, 251 N.L.R.B. 1380, 1388 (1980) (plant manager's son did not work regular hours, arranged his schedule to avoid conflicts with school activities, was supervised by his father rather than a foreman, and was an unnecessary employee).

(Board's application of labor-nexus test in identifying those employees who should be excluded from bargaining units because of access to confidential business information for over forty years) and *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 289, 94 S.Ct. 1757, 1769, 40 L.Ed.2d 134 (1974) (Board's exclusion of managerial employees from coverage under the Act for over thirty years). Accordingly, the Board's current position is not entitled to deference and, therefore, does not justify the reversal of the court below.

II.

THE EXCLUSION OF RELATIVES OF OWNERS OF A CLOSELY HELD CORPORATION SOLELY ON THE BASIS OF THEIR FAMILY TIES CONSTITUTES AN UNAUTHORIZED AMENDMENT OF SECTION 2(3) OF THE ACT.

Under Section 2(3) of the Act, 29 U.S.C. 152(3), Congress excluded two categories of relatives from the coverage of the Act and, consequently, from bargaining units solely on the basis of their familial relationships.[5] The Board acknowledges (at page 23, footnote 12 of its Brief) that Diane and Mildred Salvo do not fall within this statutory exclusion.

Despite this admission, the Board asserts it is authorized by the Act to exclude Diane and Mildred Salvo solely on the basis of their family ties. This position is clearly inconsistent with Congressional intent as expressed in Section 2(3) of the Act. Indeed, as the analysis below reveals, the Board's position constitutes an unauthorized amendment of the Act.

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[5] Section 2(3) provides, in pertinent part:

> The term "employee" . . . shall not include . . . any individual employed by his parent or spouse . . .

Under Section 2(3) of the Act, individuals employed by their parents or spouse are not employees and, thus, are per se excluded from all bargaining units and coverage under the Act solely on the basis of their family ties. Clearly, Congress could have so excluded *other* relatives. It chose not to. This decision reflects Congressional intent not to so exclude other relatives.[9] Accordingly, the Board's position below the Court constitutes an unauthorized amendment of the Act.

The Board's arguments at pages 22-26 of its Brief miss the point. Respondent and the court below do not question the Board's authority under Section 9(b) to exclude employees from a bargaining unit who do not share a true community of interest with the other employees. However, as the courts of appeal have repeatedly recognized, Section 9(b) does not authorize the Board to adopt rules which are clearly contrary to the Congressional intent expressed in Section 2(3).

For example, in *N.L.R.B.* v. *Sexton*, 205 F.2d 940 (1953), the Sixth Circuit stated:

> Section 2(3) of the National Labor Relations Act, as amended, 29 U.S.C.A. § 152(3), sets forth what the term "employee" shall include, and specifically excludes a spouse or child of an individual employer as such an employee, but provides for no other exclusion on the basis of family relationship. The Act, therefore, having expressly set

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[9] See, e.g., *N.L.R.B.* v. *Bildisco and Bildisco*, — U.S. —, 104 S.Ct. 1188, 1199 (1984) where the court reasoned, in pertinent part, as follows:

> Obviously, Congress knew how to draft an exclusion for collective bargaining agreements when it wanted to; its failure to do so in this context indicates that Congress intended that Section 365(a) apply to all collective bargaining agreements covered by the N.L.R.A.

> forth the individuals who are excluded from the term "employee" on the basis of family relationship, we find no justification for the exercise of discretion on the part of the Board, by virtue of Section 9 of the Act, to exclude from the appropriate bargaining unit and from participation in the election for the selection of a bargaining agent any persons on the basis of family relationship other than those specifically excluded under Section 2(3).

Similarly, in *Lake City Foundry Company* v. *N.L.R.B.*, 432 F.2d 1162, 1167 (1970), the Seventh Circuit stated:

> In reality, the Board amended Sec. 2(3) so as to exclude not only a "spouse or child of an individual employer as such an employee" as Congress had done, but also "the children of individuals who have substantial stock interests in closely held corporations". The Board cites in support of its *Foam Rubber* decision *National Labor Relations Board* v *Wyman-Gordon Co.*, 394 U.S. 759, 89 S.Ct. 1429, 22 L.Ed.2d 709. We think there is nothing in that opinion pertinent to the point. True, the court recognized, as we assume all courts do, that "Congress granted the Board a wide discretion to ensure the fair and free choice of bargaining representatives" (page 767, 89 S.Ct. at page 1430). The court did not authorize the Board to make rules in conflict with a statutory provision; . . .

In *N.L.R.B.* v. *Caravelle Wood Products, Inc.*, 466 F.2d 675, 678 (1972) (*Caravelle I*), the Seventh Circuit reiterated this point:

> We see no reason to give the Board total discretion under one section to accomplish what it cannot

under another section.

• • •

> Considering the broad definition of "employee" used by Congress in section 2(3) and the critical interests of all employees in selecting their economic representatives, we believe section 9(b) is neither specific enough nor strong enough to support a grant of total authority to the Board to exclude relatives from a unit. (footnote omitted)

In summary, the Board admits it is not authorized to exclude Diane and Mildred Sabo under Section 2(3) of the Act. The Board cannot under the guise of Section 9(b) of the Act effectuate a result which is clearly contrary to the Congressional intent expressed in Section 2(3). Consequently, the Board cannot exclude Diane and Mildred Sabo solely on the basis of their family ties.

III.

THE BOARD HAS NO AUTHORITY UNDER SECTION 9(b) OF THE ACT TO EXCLUDE EMPLOYEE-RELATIVES OF OWNERS OF A CLOSELY HELD CORPORATION IN THE ABSENCE OF PROOF THAT SAID RELATIVES RECEIVE SPECIAL JOB-RELATED PRIVILEGES OR BENEFITS.

A. The Board's Unit Placement Determinations Must Be Based On Job-Related Factors.

The Board advances the position that it has the authority under Section 9(b) to exclude employee-relatives without showing said relatives receive special job-related privileges or benefits. As the analysis below reveals, the Board's position is not in conformity with the standards for unit placement consistently sanctioned by the Board and the courts. This fact was explicitly recognized by the Seventh Circuit in *Carnelle II*, 504 F.2d at 1187:

> We conclude, therefore, that *Carnelle I* fashioned an *expanded community of interest standard* that permits the Board to exclude employees on the basis of family relationship — without regard to job-related factors — provided the factual finding implicitly required by the guidelines is made in each case. (emphasis added)

Significantly, the Board has not employed the term "expanded community of interest" in either its Brief or its post-*Carnelle I* decisions. The Board is obviously reluctant to use this terminology because there is simply no legal basis for expanding the community of interest standard.[7] On the contrary, the Board and the courts have consistently defined community interest in terms of job-related criteria. Moreover, as will be demonstrated *infra*, this Court has rejected a similar attempt by the Board to circumvent this established definition.

The fact that community of interest is defined in terms of job-related criteria is reflected in the Board's decision in *Kalamazoo Paper Box Corp.*, 136 N.L.R.B. 134, 137, 49 L.R.R.M. 1715 (1962), where it enumerated the factors to be considered in determining community of interest as follows:

> [A] difference in method of wages of compensation; different hours of work; different employment benefits; separate supervision; the degree of dissimilar qualifications, training and skills; differences in job functions and amount of working time spent away from the employment or plant situs . . . ; the infrequency or lack of contact with other employees; lack of integration with the work functions of other employees or interchange with them; and the history of bargaining.

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[7] In fact, the court below explicitly rejected an expanded community of interest standard. (Pet. App. 3a).

Similarly, in its 1950 Annual Report, the Board stated that in resolving the unit issue "the Board's primary concern is to group together only employees who have substantial mutual interest in wages, hours and other conditions of employment." 1950 N.L.R.B. Ann. Rep. 39 (1951).

The federal courts of appeal have adopted an identical community of interest standard. For example, in *Pacific Southwest Airlines* v. *National Labor Relations Board*, 567 F.2d 1032, 1042 (1978), the Ninth Circuit stated:

> The most reliable indicium of common interests among employees is similarity in their skills, duties, and working conditions. See *Allied Chemical & Alkali Workers of America, Local Union 1*, 404 U.S. at 172, 92 S.Ct. 383; N.L.R.B., Fifteenth Annual Report 39 (1950); American Bar Ass'n, The Developing Labor Law 217-19 (C. Morris ed. 1971).

The Board attempts to circumvent the requirement that community of interest be based on job-related conditions by arguing that individuals supposedly aligned with management must be excluded from bargaining units irrespective of the terms and conditions of their employment. See generally pages 16-22 of the Board's Brief. In *N.L.R.B.* v. *Yeshiva University*, 444 U.S. 672, 100 S.Ct. 856, 63 L.Ed.2d 115 (1980), the majority of this Court rejected a similar Board attempt to circumvent an analysis of on the job conditions through an "alignment with management" argument. Specifically, in *Yeshiva University*, the Board argued the Yeshiva faculty should be covered under the Act even though they appeared to perform managerial functions. The Board observed that the faculty were expected to exercise independent professional judgment in the performance of their managerial

functions. The Board concluded that they were not required to be loyal to management and, consequently, were not aligned with management. The Court rejected this argument, finding that the controlling consideration was not faculty loyalty, but rather the actual duties and responsibilities of the faculty at the work place:

> The controlling consideration in this case is that the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial.
>
> • • •
>
> The Board has recognized that employees whose decisionmaking is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage even if union membership arguably may involve some divided loyalty. Only if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management.

Id., 444 U.S. at 686-690, 100 S.Ct. at 864-866. (footnote omitted) (emphasis added)[9]

This Court was not the first adjudicative body to rule that alignment with management must be established through job status. As revealed *supra*, the Board in *International Metal Products Co.*, developed the special status test as the *modus operandi* for establishing alignment with management. Specifically, the Board at 107 N.L.R.B. 67 held:

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[9] See also, *N.L.R.B.* v. *Hendricks County Rural Electric Membership Corp.*, 102 S.Ct. at 222-224, wherein this Court cited with approval the Board's job-based rationale for its labor-nexus test through which confidential employees are excluded from coverage under the Act.

> We are convinced that the mere coincidence of a family relationship between an employee and his employer does not negate the mutuality of employment interest which an individual shares with fellow employees, *absent evidence that because of such relationship he enjoys a special status which allies his interests with those of management.* (emphasis added)

In summary, the Board and the courts have consistently defined community of interest in terms of job-related criteria. The Board's attempt to expand this definition and circumvent it through an "alignment with management" analysis which has no basis in the job is without merit. As the Sixth Circuit has consistently held, negation of mutuality of interest and alignment with management must be established through evidence of special job-related privileges or benefits. The Board cannot substitute terminology such as "alignment with management" for the required facts.

5. Excluding Employee-Relatives Of Owners Of A Closely Held Corporation Without Evidence Of Special Job-Related Privileges Or Benefits Constitutes A Substitution Of Experiences For Evidence Which The Board Is Not Authorized To Do Under Section 9(b) Of The Act.

The Board has consistently substituted its "experiences" for objective evidence when not anchored to the facts by the special status test. This phenomenon, in fact, was one of the motivating forces behind the development of the special status test. As the Board recognized in *International Metal Products Co.*, 107 N.L.R.B. at 66-67:

> However, it appears that what was originally an evaluation and weighing of interests, wherein recognition was given to ties created by family kinship, became under this policy an irrebuttable conclusion that the mere existence of such a relationship within a given area negated the possibility of the existence of any community of interest. (emphasis added)

In *Foam Rubber City #2 of Florida, Inc.*, supra, the decision in which the Board overruled *International Metal Products Co.*, the Board again engaged in the very behavior that motivated it to adopt the special status test. In that case, the Board released itself from the anchor of the special status test and then jumped to the irrebuttable conclusion that the children of principals of closely held corporations should be excluded merely because of their familial relationships. There was no evidentiary basis for this finding. The conclusion was based on the observation that "*it is obvious* that such children, because of their relationship with a substantial owner of this type of enterprise, have interests more closely identified with management than with their fellow employees." *Id.*, 167 N.L.R.B. at 624. (emphasis added)

Subsequent to *Foam Rubber City #2*, the Board reasoned to substitute generalizations for evidence. For example, in *Parisoff Drive-In Market, Inc.*, 201 N.L.R.B. 813, 814 (1973) reasoned as follows:

> Where, however, all the owners are members of the same family and related to one another as well as to the questioned employee, *we believe it more likely* that the business interests of the corporation will be synonymous with the interests of the family to which the employee belongs. His interests as a member of the governing family may well outweigh his interests as an employee of the corporation and, to that extent, his interests may *be entirely different* from the interests of the other employees whose sole stake in the corporation is that they work there.

We note also that here the challenged individuals' parent is not only a substantial shareholder and its vice president, but is also active in the day-to-day management of the Employer. In these circumstances, *it is a virtual certainty* such individuals would get a more attentive and sensitive ear to their day-to-day and long-range work concerns than would other employees.

• • •

Finally, we consider it relevant that all the voters here in question live at home with their parents. *Generally*, where children are still living with parents they are also dependent upon them, and with dependence *there is a considerable potential for influence*. Moreover, *aside from the likely dependence*, children living with a parent who is active in managing the corporation *can reasonably be expected to be exposed* to information about personnel problems, labor relations dealings, and even corporate profitability. (emphasis added)

See also *Economy Cash Stores, supra; Federal Prescription Service, supra; Serve-U-Stores, Inc., supra; Viele & Sons, Inc., supra; Marvin Witherow Trucking, supra; Dunn Bros. Inc., supra; Ellis Funeral Homes, Inc., supra.*

The Board's attempt to substitute expertness for fact is also reflected throughout the arguments contained at pages 18-21 of its Brief. For example, as revealed above, the Board's alignment with management analysis simply constitutes an attempt to substitute terminology for the showing of a community of interest through job-related facts.

The Board's substitution of expertness for facts has been clearly and unequivocally condemned by Congress. Prior to 1947, this methodology was frequently utilized

by the Board. However, when the Taft-Hartley Act was enacted the House Conference Report on the Act stated:

> In many instances deference on the part of the courts to specialized knowledge that is supposed to inhere in administrative agencies has led the courts to acquiesce in decisions of the Board even when the findings concerned mixed issues of law and fact . . . or when they rested only on inferences that were not, in turn, supported by facts in the record . . .
>
> As previously stated . . . by reason of the new language concerning the rules of evidence and the preponderance of the evidence, *presumed expertness on the part of the Board in its field can no longer be a factor in the Board's decisions.*
>
> • • •
>
> . . . This is not to say that the courts will be required to decide any case de novo themselves weighing the evidence, but they will be under a duty to see that the Board observes the provisions of the earlier sections that it does not infer facts that are not supported by evidence or that are not consistent with evidence in the record, and that it does not concentrate on one element of proof to the exclusion of others without adequate explanation of its reasons for disregarding or discrediting the evidence that is in conflict with its findings. *The language also precludes the substitution of expertness for evidence in making decisions.*

H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 55-56 (1947) in 1 Legislative History of the Labor Management Relations Act, 1947, at 505, 559-60 (1948). (emphasis added)

This methodology has also been condemned by this Court. In *N.L.R.B.* v. *Yeshiva University*, *supra*, the Court refused to defer to the Board's determination that Yeshiva faculty were not managerial employees and were, therefore, covered by the Act. In so doing, the Court reasoned at 444 U.S. 691 as follows:

> Finally, the Board contends that the deference due its expertise in these matters requires us to reverse the decision of the Court of Appeals. The question we decide today is a mixed one of fact and law. But the Board's opinion may be searched in vain for relevant findings of fact. The absence of factual analysis apparently reflects the Board's view that the managerial status of particular faculties may be decided on the basis of conclusory rationales rather than examination of the facts of each case.

As the above analysis reveals, if the Board is permitted to exclude employee-relatives solely on the basis of their family ties, it inevitably employs the devices of irrebutable conclusion, presumption and conclusory rationale in lieu of facts. Since these devices have been unequivocally condemned by Congress and this Court, the standard championed by the Board is not entitled to deference. The Sixth Circuit test, on the other hand, requiring *evidence* of special job-related privileges and/or benefits results in decisions which are "rationally based on articulated facts and consistent with the Act." *N.L.R.B.* v. *Yeshiva University*, 444 U.S. at 691. Accordingly, the Sixth Circuit standard should be adopted.

C. Excluding Employee-Relatives Of Owners Of A Closely Held Corporation Without Evidence Of Special Job-Related Privileges Or Benefits Results In The Exclusion Of Employees On The Basis Of Their Probable Oppositon To The Union At Election Time Which Is Contrary To The Neutrality Requirements Of The Act.

As Justice Stevens recognized while sitting as a Circuit Court Judge in *Caravelle II*, 504 F.2d at 1189, the expanded community of interest test fashioned by the Seventh Circuit in *Caravelle I* and currently championed by the Board will probably not be "identifiable by any standard other than probable opposition to the union at election time . . ." As the analysis below reveals, this standard is clearly contrary to the neutrality requirements of the Act.

The Act as it now stands is wholly neutral, "requiring respect for those who oppose a union as well as for those who favor one." *N.L.R.B.* v. *Caravelle Wood Products, Inc.*, 504 F.2d at 1189 (Justice Stevens, concurring). Accordingly, the Board must exercise its unit determination power without regard to employee preference.

The Act, however, did not always so instruct the Board. Section 9(b) of the Wagner Act instructed the Board to exercise its unit determination discretion, "to insure employees the full benefit of their right to self-organization and to collective bargaining . . ." This language was replaced through the Taft-Hartley Act by language instructing the Board to "assure employees the fullest freedom in exercising rights guaranteed by this Act." See comparison of the National Labor Relations Act of 1935 with Title I of the Labor Management Relations Act of 1947, reprinted in 2 N.L.R.B., Legislative History of the Labor Management Relations Act, 1947 at 1661, 1669-70 (1948).

The Congressional alteration of the Board's mandate under Section 9(b) was a significant one. No longer was the Board directed to exercise its unit-defining power to promote union organization. On the contrary, the language concerning promotion of union organization was *deleted*, and replaced with a mandate to assure employees the benefit of *all* their statutory rights.

At the same time the mandate of the Board under Section 9(b) was changed in the manner noted above, other changes were made in the Act as well. Perhaps the most significant of these additional changes was the addition of a new statutory right to Section 7 of the Act — the Section the Board must look to to ascertain the "rights" it is to assure under Section 9(b). The new right added to Section 7 (29 U.S.C. 157) was the right to *refrain* from engaging in concerted action. See Comparison of the National Labor Relations Act of 1935 with Title I of the Labor Management Relations Act of 1947 reprinted in 2 Legislative History of the Labor Management Relations Act, 1947 at 1661, 1666 (1948).[9]

Thus it is clear that, although the Board was empowered to encourage union organization through its

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[9] See also H. R. Rep. No. 245, 80th Cong., 1st Sess. 7 (1947) in 1 N.L.R.B., Legislative History of the Labor Management Relations Act, 1947, at 292, 298 (1948) which states:

> Important among the provisions of the bill are those that really assure to workers freedom in their organizing and bargaining activities. The old act purported to do this, but in the Board's hands it often had the opposite effect.
>
> The bill prescribes rules for the new Board to follow in setting up units for collective bargaining and in holding elections to determine whether or not employees wish labor unions to bargain for them. These rules do away with practices of the old Board by which it has subjected literally millions of workers to control by labor unions notwithstanding that the employees did not wish the unions to represent them and voted against the unions in the Board's elections.

decision making under Section 9(b) prior to 1947, *since that time* the mandate of Congress under Section 9(b) has been one of *neutrality*. The Board has been instructed to make unit determination decisions which fully protect both the right to organize and the right to remain unrepresented.

In *N.L.R.B.* v. *Savair Mfg. Co.*, 414 U.S. 270, 278, 94 S.Ct. 495, 38 L.Ed.2d 495 (1973), this Court explicitly recognized the Act's mandate of neutrality:

> Any procedure requiring a "fair" election must honor the right of those who oppose a union as well as those who favor it. The Act is wholly neutral when it comes to that basic choice. By § 7 of the Act, employees have the right not only to "form, join, or assist" unions but also the right "to refrain from any or all of such activities." 29 U.S.C. § 157.

Thus, it cannot be disputed that the Board must exercise its unit determination power in a neutral manner. Its task is to assure employees "fullest freedom" in deciding whether *or not* to select a bargaining representative. It cannot fulfill this statutory mandate by gerrymandering what it, rightly or wrongly, believes to be prospective "no" votes out of an otherwise appropriate unit, since by so doing it deprives those non-union voters who remain in the unit of their statutory right not to be represented by a union.

However, as Justice Stevens feared, the application of the standard championed by the Board results in unit inclusion or exclusion based on an employee's probable support for or opposition to the union. This result is revealed in the behavior of the Board in adjudicating cases as well as its statements in the instant case.

For example, in *Trash Removers, Inc.*, 257 N.L.R.B. 945 (1981), the Board adopted the ALJ's inclusion of two brothers-in-law of the employer's general manager (Mr. Piluso). In so doing, the ALJ reasoned at page 946 as follows:

> *Peter Madic* and *Robert Gardner*: Madic is a brother of Mr. Piluso's wife, and Gardner is the husband of Mrs. Piluso's sister. The Company would exclude these two men solely on the ground that they are related to the general manager. I deem the argument without merit and find both of these men to be properly counted in the unit. The basic theory underlying those decisions in which the Board has excluded relatives of the boss is that they are shown, by the record, to be aligned with management, as distinguished from being anti-management or prounion. This is why it is always the union that requests their exclusion. Here, there is not a scintilla of evidence indicating either exercise of managerial authority by these two men, or such treatment of them as would give rise to a presumption that they would be prejudiced against the Union. Indeed, the record shows exactly the opposite. Madic and Gardner were among the more active protagonists in favor of the Union. If the record clearly shows anything it is that they were absolutely antimanagement.

Similarly, in the Board's Petition for a Writ of Certiorari in the instant case, it stated at page 11 as follows:

> This "access" [to management] *lessens the likelihood that they would vote in favor of* union representation; since they have an effective avenue of access to management, their perceived need for a collective representation to provide such access is limited. (emphasis added)[10]

The Board, at page 14, footnote 7 of its Brief, cites with approval the suggestion of the Ninth Circuit to consider "the activity, if any, of the employee in the union." *Linn Gear Co.* v. *N.L.R.B.*, 608 F.2d 791, 794 (1979). See also page 24 of the Board's Brief.

Finally, at page 18 of its Brief the Board states that "[a]n employee-relative who is financially dependent on the owner . . . is likely to be motivated by very different factors than other employees, *not only in deciding whether to vote for a union*, but in evaluating the proper course of the bargaining process (should a union representative be selected)." (emphasis added)

These decisions and statements are obviously inconsistent with the neutrality requirement which this Court explicitly recognized in *Savair*. The Sixth Circuit's special status test, on the other hand, does not produce the abuse of discretion revealed in the decisions and statements described above. Under the Sixth Circuit test, alignment with management, i.e., lack of a community of interest with the bargaining unit, must be shown through objective record evidence of job-related privileges or benefits. In contrast, under the expanded community of interest test currently championed by the Board, exclusion can be effectuated based upon probable opposition to the union under the guise of "alignment with management." Such a finding need not be established through objective record evidence. Obviously, the expanded community of interest test invites the abuse of discretion feared by Justice Stevens in *Caravelle II*.

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[10] The Board evidently realized that this statement was damaging to its position since it does not appear in its Brief on the merits.

Accordingly, it is easy to understand the Sixth Circuit's explicit rejection of that test. In sum, the Sixth Circuit's special status test should be adopted, as it is the sole objective standard which ensures the fullest freedom to all employees.

D. Excluding Employee-Relatives Of Owners Of Closely Held Corporations From Bargaining Units Solely On The Basis Of Their Family Ties Is Not Necessary To Protect Unions From Infiltration By Persons They Do Not Trust.

At pages 17-22 of its Brief, the Board argues that its interpretation of Section 9(b) of the Act should be adopted since it prevents the infiltration of a union by an employee who may be disloyal to it. This fear of infiltration by a potential "fifth columnist" is unwarranted. Unions are free under the Act to define their own criteria for membership. Section 8(b)(1)(A), 29 U.S.C. 158(b)(1)(A) of the Act specifically provides that:

> (b) It shall be an unfair labor practice for a labor organization or its agents —
>
> > (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, *That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;* . . . (emphasis added)

Consequently, a union is free to exclude from its ranks any employee related to owners and/or managers if it feels that the employee may disrupt the cohesiveness of its membership or convey confidential information to management. Unions, therefore, *do not need* the duplicative protection sought by the Board. Unions already

possess, under Section 8(b)(1)(A) of the Act, the power to protect themselves and their processes from intrusion by persons they do not trust.

At page 17 of its Brief, the Board contends that its position serves fundamental policies under the Act in three ways:

> It assures the cohesiveness among employees necessary for effective collective bargaining; it protects the Section 7 right of employees "to bargain collectively through representatives of their own choosing[,]" free from undue influence by those aligned with management; and it protects employers and unions by ensuring that the deliberations and confidences of each are not disclosed to the other.

As revealed above, Section 8(b)(1)(A) of the Act already provides unions with the mechanism for insuring cohesion, preventing undue influence by those it perceives are aligned with management and protecting confidences.[11] Therefore, there is no policy justification for the Board's position.

The Sixth Circuit "special status" test, on the other hand, insures adherence to the policies of neutrality and fact-based Board determinations. As the experience to date indicates, if the special status test is not applied, these important, Congressionally mandated policies are ignored by the Board.

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[11] The Board's argument at page 21 of its Brief that its standard protects the confidences of employers is ludicrous. It is based on the improbable speculation that relatives who change loyalties or become involved in family squabbles will have access to confidential information and betray said information to the union. Such speculation clearly does not justify depriving employee-relatives of their Section 7 rights. Moreover, if such a change in attitude or loyalty occurs, an employer would undoubtedly deny the estranged relative access to confidential material.

E. Excluding Employee-Relatives Of Owners Of Closely Held Corporations From Bargaining Units Solely On The Basis Of Their Family Ties Produces Unjust Results.

If the Board's interpretation of Section 9(b) is adopted, employee-relatives of owners or managers of closely held corporations could be deprived of their jobs, even though they do not receive special job-related privileges or benefits. The Board would permit the exclusion of employee-relatives from a bargaining unit even though they perform the same work under the same terms and conditions of employment as the rest of the employees. Such Board action places the jobs of these relatives in jeopardy since, upon winning an election, the union would demand that only bargaining unit members perform the bargaining unit work performed by the employee-relatives. Since such a demand is a mandatory subject of bargaining[12], it could be coupled with a strike threat forcing the employer to concede to the demand. Consequently, related employees who do not enjoy special status, such as Diane and Mildred Sabo, would not only be disenfranchised, but could be deprived of their jobs simply because of their familial relationships.

In view of this result, the Board errs in citing, at page 22 of its Brief the exclusion of supervisors, managers and confidential employees as analogous situations. In those cases, the work as well as the individuals performing the work are simultaneously excluded from the bargaining unit by the Board. Consequently, the exclusion of these employees from the unit cannot result in the deprivation of their jobs.

As revealed *supra*, there is nothing in the statute which supports the Board's position and the harsh results

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[12] See *Crown Coach Corp.*, 155 N.L.R.B. 625, 628 (1965).

described herein. Accordingly, the unjust results described above should be avoided by rejecting the Board's position and affirming the analysis of the court below.

F. The Board's Attempt To Exclude Employee-Relatives Of Owners Of Closely Held Corporations On The Basis Of Their Propensity To Engage In Concerted Activity Should Be Condemned Since It Could Result In The Pursuit Of Lengthy And Hopelessly Confused Unit Determination Proceedings.

At page 14, footnote 7 of its Brief, the Board cites with approval the suggestion of the Ninth Circuit in *Linn Gear Co., supra*, to consider the activity of the employee in the union in making the unit determination decision.

Similarly, at pages 16-22 of its Brief, the Board argues, in essence, that Diane and Mildred Sabo should be excluded from the bargaining units because of their presumed propensity, due to their family ties, to refrain from engaging in concerted activity.

If the Court sanctions the employment of these devices by reversing the court below, it will encourage the pursuit of lengthy and hopelessly confused unit determination proceedings. Many factors conceivably could enter into a determination as to whether or not a particular employee would tend to support concerted action. Some religious groups discourage union membership on the part of their adherents; others do not. Some employees have had favorable personal experience with unions; others have not. Some employees have a second job or outside income to tide them over in the event of a strike; others do not. Some employees may supply a negligible increment to the family income; others may be the sole support of their family. If the Board is to inquire into the personal lives, motivations and beliefs of employees to discern their propensities for concerted action, all of

these factors — and others — would become proper subjects of investigation and the unit determination issue would become a hopeless morass.

Such unit exclusion devices are obviously inconsistent with the Board's duty to refrain from substituting "expertness" for objective facts as well as its duty to administer the Act in a neutral manner as mandated by Section 7. The special status standard utilized by the court below, on the other hand, is in strict compliance with these important Congressionally mandated policies.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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REPLY

BRIEF

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In the Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ACTION AUTOMOTIVE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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REPLY BRIEF FOR THE NATIONAL LABOB RELATIONS BOARD

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1. Respondent contends (Br. 19-22) that the exclusion of the children or spouse of an employer from the definition of "employee" in Section 2(3) of the Act, 29 U.S.C. 152(3), precludes the Board from excluding "solely on the basis of their family ties" other employee-relatives from bargaining units under Section 9(b) of the Act, 29 U.S.C. 159(b). As we pointed out in our opening brief (at 25-26), Section 2(3) places designated relatives of employers wholly outside the Act's protections, but it says nothing about how the Board should exercise its discretion in defining bargaining units with respect to other relatives who are "employees" within the Act's coverage.

Respondent concedes (Br. 26), as did the court of appeals (Pet. App. 3a-5a), that relatives, not excluded from the Act under Section 2(3), may be excluded from bargaining units if job-related factors preclude the existence of the requisite community of interest. Respondent asserts (Br. 22-26), however, that the Board's test is not an application of the community of interest standard, but is a *per se* exclusion based on nothing more than family relationship.

This contention is without merit. The Board's current policy does not exclude employee-relatives on the basis of family relationship alone; rather the Board, in response to *NLRB* v. *Caravelle Wood Products, Inc.* (*Caravelle I*), 466 F.2d 675 (7th Cir. 1972), now considers not only the family relationship (which is the sole basis for exclusion under Section 2(3)), but also any other relevant circumstances in determining whether the interests of employee-relatives are distinct from those of other employees.[1] Although job-related factors are the most common criteria for determining whether employees share sufficient interests to be grouped in the same bargaining unit under

[1] As we stated in our opening brief (at 14), the primary factors the Board considers are (*Caravelle I*, 466 F.2d at 679):

> [H]ow high a percentage of stock the parent or spouse owns, how many of the shareholders are related to one another, whether the shareholder is actively engaged in management or holds a supervisory position, how many relatives are employed as compared with the total number of employees, [and] whether the relative lives in the same household or is partially dependent on the shareholder.

Respondent cites *Caravelle I*, *supra* (Br. 21-22) for the proposition that Section 2(3) precludes the Board's family exclusion rule without acknowledging that it is the very rule suggested in *Caravelle I* that the Board has adopted and applied in this case.

Section 9(b), there is no basis for concluding that they are the *only* relevant factors.[2] As we explained in our opening brief (Br. 16-22), the Board's current family exclusion rule furthers the basic policies underlying the Board's community of interest doctrine because it fosters efficient collective bargaining relationships, protects the Section 7 rights of employees, and maintains a proper line between management and labor.[3]

[2] Respondent's reliance (Br. 24-25) on *NLRB* v. *Yeshiva University*, 444 U.S. 672 (1980), is misplaced. In *Yeshiva*, this Court held that because of their job duties and responsibilities certain full-time college faculty members were managerial employees, and hence outside the scope of the Act. Nothing in *Yeshiva* suggests that job-related factors are the only permissible considerations that may enter into a Board determination whether certain employees share a sufficient community of interest to be grouped in the same bargaining unit with other employees.

[3] Respondent's claim (Br. 14-19) that the Board, since adopting the *Caravelle* criteria, has failed to maintain a consistent approach to employee-relative exclusions is erroneous. As we explained in our opening brief (at 14-15), in applying the factors drawn from *Caravelle I*, the Board typically excludes, as it did in this case, employees who live with or are otherwise financially dependent on a relative who owns or actively manages the business, particularly where other owners of the business are related to each other and to the employee-relative whose status is at issue. Where, on the other hand, application of the *Caravelle* criteria shows that an employee-relative is not aligned with management by virtue of the family relationship, the existence of a special job status is necessary before the Board will conclude that the employee-relative lacks the community of interest shared by unit employees. The Board thus excludes relatives of low-level managers with little or no ownership interest in the business only where special job status is shown.

Contrary to respondent's assertion, there is no inconsistency between concluding in some cases that employee-relatives do

2. Respondent's contention (Br. 39-40) that the Board's family exclusion policy impermissibly involves the Board in vague, subjective considerations of employees' personal lives and motivations misconceives the Board's policy as applied. The Board does not base its decision on speculation as to the possible subjective effects of a family relationship on the employee-relative's willingness to participate in union activity. Instead, the Board's determination is based on objective factors drawn from *Caravelle I*, which are designed to determine whether an employee-relative is more closely aligned with management than with unit employees. Although these factors focus on circumstances surrounding the family relationship such as the extent of the family's ownership, the position of the owner or manager in the business, and the financial and living arrangements between the owner and the employee-relative, these factors are no less objective than any other factors relevant to a community of interest analysis, including job-related factors. The Board does not inquire into any employee-relative's state of mind in making its findings concerning the community of interest of the employees.[4]

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not share a community of interest with other employees on the basis of the *Caravelle* factors, and requiring further evidence, such as special job status, in other cases where the *Caravelle* factors alone are not sufficient to establish lack of a community of interest. The cases cited by respondent (Br. 17-18 & nn.3-4) merely reflect the application of these principles; indeed, we cited many of the same cases in our opening brief (Br. 14-15 & nn.6, 8) to illustrate these basic principles.

[4] In our opening brief, we anticipated (at 19 n.10) respondent's contention (Br. 31-36) that the Board impermissibly excludes employee-relatives solely on the basis of their

Nor is there merit to respondent's contention (Br. 26-30) that the Board's family exclusion policy impermissibly substitutes the Board's "expertness" for evidence that employee-relatives lack a community of interest with members of the unit. In shaping appropriate bargaining units in this area, the Board examines the objective facts concerning family relationships on the record before it and draws a reasoned conclusion from the record evidence as to whether employee-relatives are aligned with management so as to warrant their exclusion from a unit or share a community of interest with unit employees and therefore should be included. It is well settled that the Board, as an administrative agency in a specialized field, is entitled to draw on its experience in making factual inquiries and to draw reasonable inferences from the facts presented, *Radio Officers* v. *NLRB*, 347 U.S. 17, 48-50 (1954), which is precisely what it

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probable opposition to a union in an election. Although employees who lack a community of interest with others on the basis of the *Caravelle* factors may well oppose a union when others favor it, the opposition is merely a consequence of the divergent interests, and is not itself a basis for the employee's exclusion from the unit. Rather, the exclusion is designed to obviate conflicts within the unit that could harm the bargaining process and to protect the interests of both unions and employers (Br. 17-21).

Nor is there substance to respondent's contention (Br. 39-40) that allowing the Board to include family relationships as a factor in making unit determinations would turn unit determination proceedings into a "hopeless morass." The Board has been considering that factor for many years without any evidence of a serious administrative problem. In any event, the determination of whether the inquiry is unmanageable is a matter that the Board is in the best position to evaluate.

did in this case. See *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 348-349 (1953).[5]

3. Finally, respondent's contention (Br. 36-37) that the Board's family exclusion policy is "unnecessary" because unions independently have authority to exclude employee-relatives from their ranks is beside the point. It is the Board's function in shaping appropriate bargaining units pursuant to Section 9(b) of the Act to promote efficient collective bargaining and to protect the rights of employees to self-organization and freedom of choice by eliminating conflicts among unit employees that might impair the collective bargaining process and by preserving the distinct line between labor and management. To the extent that a union would be inclined to exclude certain employee-relatives from membership in order to ensure cohesion in its ranks, that is simply further evidence that in some cases such employee-relatives have interests distinct from other employees and therefore should be excluded from the bargaining unit by the Board.[6]

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[5] Respondent's reliance (Br. 28-29) on the legislative history of the Taft-Hartley amendments to suggest that the Board may not rely on its experience and judgment in drawing inferences and conclusions from the evidence before it is totally misplaced. This Court rejected the identical argument in *Radio Officers* v. *NLRB*, 347 U.S. at 50 (quoting *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 488 (1951)), stating that the amendments were not "'intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect.'"

[6] Equally off the mark is respondent's claim (Br. 38-39) that, by excluding employee-relatives who may perform the same work as bargaining unit employees, the Board jeopardizes the jobs of the employee-relatives by creating a situation in which a union could demand during the ensuing collective bargaining that only unit employees perform unit work. Of course, such a demand, even if made, would not necessarily cause anyone to lose his job; management does not have to accede to the demand. Moreover, respondent's point applies whenever the Board excludes employees on the ground that they receive special compensation or benefits for the same work as unit employees, an exclusion that respondent concedes (Br. 26) is permissible under traditional community of interest principles.

For the foregoing reasons, and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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